Applicant Details

First Name	**Zachary**
Last Name	**Damir**
Citizenship Status	**U. S. Citizen**
Email Address	**zdamir@nd.edu**
Address	**Address** **Street** **54746 Twyckenham Dr. #3215** **City** **South Bend** **State/Territory** **Indiana** **Zip** **46637** **Country** **United States**
Contact Phone Number	**6266227355**

Applicant Education

BA/BS From	**California Lutheran University**
Date of BA/BS	**December 2019**
JD/LLB From	**Notre Dame Law School** **http://law.nd.edu**
Date of JD/LLB	**May 19, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Notre Dame Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Notre Dame Moot Court Board, Seventh Circuit Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Waddilove, David
dwaddilo@nd.edu
Pojanowski, Jeffrey
Pojanowski@nd.edu
Kelley, William
William.K.Kelley@nd.edu
574-631-8646

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Zachary A. Damir

54746 Twyckenham Dr. #3215
South Bend, IN 46637

(626) 622-7355
zdamir@nd.edu

June 21, 2023

The Honorable T. Kent Wetherell II
United States District Court for the Northern District of Florida
One North Palafox Street
Pensacola, FL 32502-5665

Dear Judge Wetherell,

I am a second-year student at Notre Dame Law School. I am writing to apply for a clerkship in your chambers beginning in 2024. I plan to pursue a career in litigation and public service.

Enclosed is my resume, law school transcript, and writing sample. You will also receive letters of recommendation from the following people. They would be glad to discuss my candidacy with you.

Dr. David P. Waddilove	Prof. Jeffrey A. Pojanowski	Prof. William K. Kelley
Notre Dame Law School	Notre Dame Law School	Notre Dame Law School
dwaddilo@nd.edu	Pojanowski@nd.edu	wkelley@nd.edu
(734) 277-3194	(574) 631-8078	(574) 631-8646

If I can provide additional information that would be helpful to you, please let me know. Thank you for your consideration.

Respectfully,

Zachary A. Damir

Zachary A. Damir

(626) 622-7355 • zdamir@nd.edu
54746 Twyckenham Dr. #3215 South Bend, IN 46637

EDUCATION

University of Notre Dame Law School — Notre Dame, IN
Juris Doctor Candidate — May 2024
Current GPA: 3.513

- *Notre Dame Law Review*, Executive Articles Editor, Vol. 99
- Notre Dame Moot Court Seventh Circuit Team, Brief Writer and Oralist
- Notre Dame Federalist Society, Vice President
- Teaching Assistant for Property Professor D. P. Waddilove (Spring 2023)
- Faculty Award for Excellence in Natural Resources
- Galilee Public Interest Immersion Course

California Lutheran University — Thousand Oaks, CA
Bachelor of Arts in Political Science, Departmental Honors, summa cum laude — May 2020
Final GPA: 3.91

- Study Abroad: Balliol College, University of Oxford (Fall 2018)
- Political Science Department, Independent Researcher (January – December 2019)
- Debate Team, Captain; Model United Nations

EXPERIENCE

Institute for Justice (IJ) — Seattle, WA
Dave Kennedy Fellowship — May 2023 – August 2023

- Writes legal memos and briefs about constitutional challenges to state and federal regulations or laws on short deadlines before discussing related litigation with IJ attorneys
- Attends and participates in litigation, legal theory, and media workshops and roundtables with IJ specialists
- Contributes to litigation strategy in free speech, economic liberty, educational liberty, and property related cases

University of Notre Dame Law School — South Bend, IN and Virtual
Research Assistant for Professor D.P. Waddilove — May – August 2022

- Read, summarized, critiqued, and discussed cases and scholarly research related to private law and theory
- Edited Prof. Waddilove's writing to synthesize the best possible arguments for his publications
- Crafted academic and legal narratives concerning private law jurisprudence from Prof. Waddilove's research
- Drafted sections of law review articles, one about a new theory of property law and the other about contracts breached during the pandemic, incorporating feedback to create a final product that is ready for circulation

American Enterprise Institute — Washington, D.C.
Government Relations Intern — May – August 2019

- Attended and prepared for Congressional hearings, offered support and political analysis to testifying AEI persons
- Wrote newsletters, memoranda, and summaries of AEI publications and events, used in Congressional mailings
- Worked to plan and present interviews, panels, and networking events involving national officials to the audience
- Completed projects for staff on socioeconomic and foreign policy issues to be used for communications to Congress

Office of then-Majority Leader Kevin McCarthy — Washington, D.C.
Intern—House Leadership Office — January – April 2018

- Drafted and complied memos, policy papers, and interoffice correspondence for the Congressman and his staff
- Researched legislative history and public records to advise staff about members' dispositions before official voting
- Directed U.S. Capitol tours, concisely speaking to large groups, maintaining a friendly and professional appearance

INTERESTS

Neapolitana pizza, Watching bad television shows, European travel, Cello and orchestral music, Cathedral architecture

How to Authenticate This Official Transcript

This official transcript has been delivered to the recipient, and is intended solely for use by that recipient. It is not permissible to replicate this document or forward it to any person or organization other than the identified recipient. Release of this record or disclosure of its contents to any third party without written consent of the record owner is prohibited.

Printed Transcript:
If you have received this transcript as a printed document, you may verify the authenticity by testing the security features noted on the document.

Electronic Transcript:
If receiving electronically, this official transcript has been digitally signed and therefore contains special characteristics. This document will reveal a digital certificate that has been applied to the transcript, and for optimal results, we recommend that this document is viewed with the latest version of Adobe® Acrobat or Adobe® Reader. This digital certificate will appear in a pop-up screen or status bar on the document, display a blue ribbon, and declare that the document was certified by Parchment, with a valid certificate issued by GlobalSign CA for Adobe®. This document certification can be validated by clicking on the Signature Properties of the document.

The Blue Ribbon Symbol: The blue ribbon is your assurance that the digital certificate is valid, the document is authentic, and the contents of the transcript have not been altered.

Invalid: If the transcript does not display a valid certification and signature message, reject this transcript immediately. An invalid digital certificate display means either the digital signature is not authentic, or the document has been altered. The digital signature can also be revoked by the transcript office if there is cause, and digital signatures can expire. A document with an invalid digital signature display should be rejected.

Author Unknown: Lastly, one other possible message, Author Unknown, can have two possible meanings: The certificate is a self-signed certificate or has been issued by an unknown or untrusted certificate authority and therefore has not been trusted, or the revocation check could not complete. If you receive this message make sure you are properly connected to the internet. If you have a connection and you still cannot validate the digital certificate on-line, reject this document.

The current version of Adobe® Reader is free of charge, and available for immediate download at http://www.adobe.com.

ABOUT PARCHMENT: Parchment is an academic credential management company, specializing in delivery of official electronic credentials. As a trusted intermediary, all documents delivered via Parchment are verified and secure.
Learn more about Parchment at www.parchment.com

parchment®

UNIVERSITY OF NOTRE DAME NOTRE DAME, INDIANA 46556

Damir, Zachary A.
Student ID: XXXXX8462

Date Issued: 01-JUN-2023
Page: 1

Birth Date: 08-16-XXXX

Issued To: Zachary Damir
Parchment DocumentID: TWB5J4RJ
zdamir@nd.edu

Course Level: Law
Program: Juris Doctor
College: Law School
Major: Law

CRSE ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS ATTEMP HRS	UND SEMESTER TOTALS EARNED HRS	UND SEMESTER TOTALS GPA HRS	UND SEMESTER TOTALS GPA	OVERALL TOTALS ATTEMP HRS	OVERALL TOTALS EARNED HRS	OVERALL TOTALS GPA HRS	OVERALL TOTALS GPA
UNIVERSITY OF NOTRE DAME CREDIT:												
Fall Semester 2021												
Law School												
LAW 60105	Contracts	4.000	B	12.000								
LAW 60302	Criminal Law	4.000	B	12.000								
LAW 60703	Legal Research	1.000	B+	3.333								
LAW 60705	Legal Writing I	2.000	A-	7.334								
LAW 60901	Torts	4.000	B+	13.332								
		Total		47.999	15.000	15.000	15.000	3.200	15.000	15.000	15.000	3.200
Spring Semester 2022												
Law School												
LAW 60307	Constitutional Law	4.000	B+	13.332								
LAW 60308	Civil Procedure	4.000	B+	13.332								
LAW 60707	Legal Resrch & Writing II-MC	1.000	A-	3.667								
LAW 60906	Property	4.000	B+	13.332								
LAW 70318	Legislation & Regulation	3.000	A	12.000								
LAW 75700	Galilee	1.000	S	0.000								
		Total		55.663	17.000	17.000	16.000	3.479	32.000	32.000	31.000	3.344
Fall Semester 2022												
Law School												
LAW 70137	Trademark & Unfair Comp	3.000	A-	11.001								
LAW 70315	Administrative Law	3.000	B+	9.999								
LAW 73204	Private Law Workshop	2.000	A	8.000								

CONTINUED ON PAGE 2

UNIVERSITY OF NOTRE DAME NOTRE DAME, INDIANA 46556

Damir, Zachary A.
Student ID: XXXXX8462

Birth Date: 08-16-XXXX

Date Issued: 01-JUN-2023
Page: 2

CRSE	ID	COURSE TITLE	CRS HRS	GRD	QPTS	UND SEMESTER TOTALS ATTEMP HRS	UND SEMESTER TOTALS EARNED HRS	UND SEMESTER TOTALS GPA HRS	UND SEMESTER TOTALS GPA	OVERALL TOTALS ATTEMP HRS	OVERALL TOTALS EARNED HRS	OVERALL TOTALS GPA HRS	OVERALL TOTALS GPA
University of Notre Dame Information continued:													
LAW	75710	Intensive Trial Ad	4.000	S	0.000								
LAW	75743	Moot Court Appellate	1.000	S	0.000								
LAW	75749	Law Review	1.000	S	0.000								
			Total		29.000	14.000	14.000	8.000	3.625	46.000	46.000	39.000	3.402
Spring Semester 2023													
Law School													
LAW	70305	Constitutional Law II	3.000	B+	9.999								
LAW	70350	Natural Resources Law	3.000	A	12.000								
LAW	70457	Rule of Law Seminar	2.000	A	8.000								
LAW	70841	History of the Common Law	3.000	A	12.000								
LAW	75743	Moot Court Appellate	1.000	S	0.000								
LAW	75749	Law Review	1.000	S	0.000								
LAW	76101	Directed Readings	2.000	A	8.000								
			Total		49.999	15.000	15.000	13.000	3.846	61.000	61.000	52.000	3.513
Fall Semester 2023													
IN PROGRESS WORK													
LAW	70201 M	Evidence	3.000	IN PROGRESS									
LAW	70312 M	Suing the Federal Government	3.000	IN PROGRESS									
LAW	70371 M	Conflict of Laws	3.000	IN PROGRESS									
LAW	70468 M	Post-Conviction Remedies	2.000	IN PROGRESS									
LAW	70736 M	Public Interest Externship	1.000	IN PROGRESS									
LAW	70808 M	Legal Ethics: Prof. R Examined	3.000	IN PROGRESS									
LAW	75737 M	Seventh Circuit Pract Ext FW	2.000	IN PROGRESS									
		In Progress Credits	17.000										

********** TRANSCRIPT TOTALS **********

NOTRE DAME	Ehrs:	61.000	QPts:	182.661
	GPA-Hrs:	52.000	GPA:	3.513
TRANSFER	Ehrs:	0.000	QPts:	0.000
	GPA-Hrs:	0.000	GPA:	0.000
OVERALL	Ehrs:	61.000	QPts:	182.661
	GPA-Hrs:	52.000	GPA:	3.513

********** END OF TRANSCRIPT **********

CAMPUS CODES

All courses taught at an off campus location will have a campus code listed before the course title.
The most frequently used codes are:

AF Angers, France
DC Washington, DC
FA Fremantle, Australia
IA Innsbruck, Austria
IR Dublin, Ireland
LA London, England (Fall/Spring)
LE London, England (Law-JD)
LG London, England (Summer EG)
LS London, England (Summer AL)
PA Perth, Australia
PM Puebla, Mexico
RE Rome, Italy
RI Rome, Italy (Architecture)
SC Santiago, Chile
SP Toledo, Spain

For a complete list of codes, please see the following website:
http://registrar.nd.edu/pdf/campuscodes.pdf

GRADING SYSTEM - SEMESTER CALENDAR

Previous grading systems as well as complete explanations are available at the following website:
http://registrar.nd.edu/students/gradefinal.php

August 1988 - Present

Letter Grade	Point Value	Legend
A	4	
A-	3.667	
B+	3.333	
B	3	
B-	2.667	
C+	2.333	
C	2	Lowest passing grade for graduate students.
C-	1.667	
D	1	Lowest passing grade for undergraduate students.
F	0	Failure
F*	0	No final grade reported for an individual student (Registrar assigned).
X	0	Given with the approval of the student's dean in extenuating circumstances beyond the control of the student. It reverts to "F" if not changed within 30 days after the beginning of the next semester in which the student is enrolled.
I	0	Incomplete (reserved for advanced students in advanced studies courses only). It is a temporary and unacceptable grade indicating a failure to complete work in a course. The course work must be completed and the "I" changed according to the appropriate Academic Code.
U		Unsatisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).

Grades which are not Included in the Computation of the Average

S Satisfactory work (courses without semester credit hours, as well as research courses, departmental seminars or colloquia or directed studies; workshops; field education and skill courses).
V Auditor (Graduate students only).
W Discontinued with permission. To secure a "W" the student must have the authorization of the dean.
P Pass in a course taken on a pass-fail basis.
NR Not reported. Final grade(s) not reported by the instructor due to extenuating circumstances.
NC No credit in a course taken on a pass-no credit basis.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: http://registrar.nd.edu/students/gradefinal.php

THE LAW SCHOOL GRADING SYSTEM

The current grading system for the law school is as follows: A (4.000), A- (3.667), B+ (3.333), B (3.000), B- (2.667), C+ (2.333), C (2.000), C- (1.667), D (1.000), F or U (0.000).

Effective academic year 2011-2012, the law school implemented a grade normalization policy, with mandatory mean ranges (for any course with 10 or more students) and mandatory distribution ranges (for any course with 25 or more students). For Legal Writing (I & II) only, the mean requirement will apply but the distribution requirement will not apply. The mean ranges are as follows: for all first-year courses (except for the first-year elective, which is treated as an upper-level course), the mean is 3.25 to 3.30; for large upper-level courses (25 or more students), the mean is 3.25 to 3.35; for small upper-level courses (10-24 students), the mean is 3.15 to 3.45.

For current and historical grade point averages by class, as well as additional information regarding prior grading policies and current distribution ranges, see: http://registrar.nd.edu/students/gradefinal.php

TRANSCRIPT NOT OFFICIAL IF WHITE SIGNATURE AND BLUE SEAL ARE DISTORTED

CHUCK HURLEY, UNIVERSITY REGISTRAR

In accordance with USC 438 (6) (4) (8) (The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without the written consent of the student. Alteration of this transcript may be a criminal offense.

COURSE NUMBERING SYSTEM

Previous course numbering systems (prior to Summer 2005) are available at the following website:
http://registrar.nd.edu/faculty/course_numbering.php

Beginning in Summer 2005, all courses offered are five numeric digits long (e.g. ENGL 43715).
The first digit of the course number indicates the level of the course.

ENGL 0 X - XXX = Pre-College course
ENGL 1 X - XXX = Freshman Level course
ENGL 2 X - XXX = Sophomore Level course
ENGL 3 X - XXX = Junior Level course
ENGL 4 X - XXX = Senior Level course
ENGL 5 X - XXX = 5th Year Senior / Advanced Undergraduate Course
ENGL 6 X - XXX = 1st Year Graduate Level Course
ENGL 7 X - XXX = 2nd Year Graduate Level Course (MBA / LAW)
ENGL 8 X - XXX = 3rd Year Graduate Level Course (MBA / LAW)
ENGL 9 X - XXX = Upper Level Graduate Level Course

Zachary A. Damir

Writing Sample

This writing sample is an unedited draft for a Note written for publication by the *Notre Dame Law Review*. It examines the use of punctuation marks to determine legislative intent. In particular, the Note focuses on parentheses, which have been a subject of debate in recent decisions. It concludes that a new syntactic canon of construction should be adopted. That canon would resolve ambiguity arising from statutory parentheses.

DISFAVORING STATUTORY PARENTHESES (EXCEPT IN CERTAIN CIRCUMSTANCES)

INTRODUCTION

A pair of parentheses can mean the difference in Medicare benefits,[1] regulatory exemptions,[2] court jurisdiction,[3] and possibly anything else governed by a statute with a parenthesis. Legislatures often use parentheses to separate provisions,[4] and even their absence has consequences. As one circuit court judge wrote, imitating an oft-cited quote in *O'Connor v. Oakhurst Dairy*,[5] "[f]or want of a pair of parentheses, we have a case."[6] Statutes and litigation regarding this punctuation mark are increasingly important. Four Supreme Court cases have discussed them in the last couple Terms.[7] They are not going away either, given the large number of parentheses in state and federal law.[8]

Despite its large presence in the legal world, there has been absolutely no scholarship expressly discussing the parenthesis and its bearing in statutory interpretation. This is a shame because the parenthesis has a unique place in legal history compared to its fellow punctuation marks, and it has a similarly nuanced role today. It is also deserving of study because it faces a decline born of a misunderstanding regarding its functions.

The parenthesis should be placed in the proper context, and this writing does that grammatically, historically, and legally. They have been used by courts and legislatures alike for hundreds of years. On that subject, this Note contributes to existing literature by proving an inverse relationship between the history of legal punctuation and the history of parentheses in legal documents.

In recent years, however, there have been warnings against their continued use due to ambiguous sentences and directives they create.[9] Court decisions mirror the concern by explicitly disfavoring parentheses and the material they contain. While this is often the right decision, the trend is based partly on a mistaken belief in the parentheses' use and ignores the important variety of functions they serve. Justice O'Connor once wrote that there is "no generally accepted canon of statutory construction favoring language outside of parentheses to language within them, nor do I think it wise for the Court to adopt one . . . ."[10] This Note takes the opposite view: a canon of construction against parentheses is certainly necessary, but it should not reflect the overzealous nature of the current trend. It should disfavor many parentheses, but permit others based on their intended usage. Accounting for distinctions would better respect the grammatical realities and contrary precedents on the ground.

---

[1] *See* Becerra v. Empire Health Found., 142 S. Ct. 2354 (2022).
[2] *See* Chickasaw Nation v. United States, 534 U.S. 84 (2001).
[3] *See* Boechler v. Commissioner, 142 S. Ct. 1493 (2022); Biden v. Texas, 142 S. Ct. 2528, 2538 (2022).
[4] *See infra* notes 134–37 and accompanying text.
[5] 851 F.3d 69, 69 (2017) ("For want of a comma, we have this case.").
[6] Howard v. Mercer Transp. Co., Inc., 566 Fed. Appx. 459, 460 (6th Cir. 2014).
[7] *See infra* Part IIIA (discussing those cases).
[8] *See infra* notes 108, 112 & 115 (providing some short lists of statutes with parentheses).
[9] *See infra* notes 138–44 and accompanying text.
[10] 534 U.S. at 98 (O'Connor, J., dissenting).

The Note continues as follows: Part I will cover the story of punctuation in legal documents, from the early British statutes to the current textualist methodology. Part II will describe three important ways parentheses are used in modern statutes and demonstrate that they have a strong backing in legal history. Part III traces a general aura of distrust regarding parentheses in the court system, but explains that not all statutory parentheses have been condemned as immaterial. Finally, Part IV synthesizes the other parts to make the case for a new canon of construction specifically dealing with the parenthesis. It concludes that courts wishing to adopt a historically and grammatically faithful view of parentheses should adopt this canon: a statement in parentheses should be discounted when it conflicts with the rest of the text, but an exception or definition in parentheses should not be discounted.

Before beginning, a few clarifications are in order: First, "parentheticals" are mentioned throughout this paper. This should not be taken to mean a parenthetical phrase, which can be separated from a sentence with various punctuation. In these pages, a "parenthetical" instead means words appearing inside parentheses (this phrase, for instance, is considered a parenthetical). Second, this discussion does not opine on the use of parentheses to denote section numbers, citations, and the like. It concerns only operative words within a legal text. Finally, this Note only deals with parentheses in really hard cases, where the parenthetical or the words therein indicate an intent that might be at odds with the rest of the statute or a single, important provision. There are many benign parentheses out there, and they should not be disfavored due to this analysis and proposal.

I. PUNCTUATION AND STATUTORY INTERPRETATION

Punctuation marks—commas, hyphens, dashes, quotation and exclamation marks, periods, colons, semicolons, brackets, ellipses, and parentheses—play an important role in the English language.[11] They tell a reader how to read complex sentences that may otherwise be confusing or ambiguous.[12] It follows that punctuation marks could be used to clarify complex sentences in statutes. While it is true that the issue before a court is not often solely about punctuation marks,[13] they play a role in statutory interpretation. This is because without punctuation, "a reader might [punctuate] for you, in places you never wanted it."[14] It might even be an interpreter's "manifesto to master even the most oblique, obscure, conventions and designations of the existing system of punctuation."[15] Yet there was a long tradition that prevented the consideration of punctuation in statutory interpretation. This Part will review that tradition and its decline, showing that it should hold no sway over contemporary judges. Punctuation indicates meaning and intent just as much as words do.

---

[11] UNIV. OF LYNCHBURG, *A Quick Guide to Punctuation* (2022), https://www.lynchburg.edu/academics/writing-center/wilmer-writing-center-online-writing-lab/grammar/a-quick-guide-to-punctuation/.

[12] *See* John Yong & Design Taxi, *10 Hilarious Examples that Prove Punctuation Makes a Huge Difference*, BUS. INSIDER (Apr. 13, 2015), https://www.businessinsider.com/why-punctuation-matters-2015-4; BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE 3 (2006) ("Punctuation marks are like traffic signs that guide readers through sentences."). *See generally* KARINA LAW, LET'S EAT GRANDMA! A LIFE-SAVING GUIDE TO GRAMMAR AND PUNCTUATION (2017).

[13] *See* Lance Phillip Timbreza, *The Elusive Comma: The Proper Role of Punctuation in Statutory Interpretation*, 24 QLR 63, 66 (2005).

[14] DAVID MELLINKOFF, LEGAL WRITING: SENSE AND NONSENSE 57 (1982).

[15] LENNÉ EIDSON ESPENCHIED, THE GRAMMAR AND WRITING HANDBOOK FOR LAWYERS 80 (2011).

A. TRADITIONAL NOTIONS OF DISMISSAL

The long-standing practice of courts has been to dismiss punctuation marks in statutory text. This was partly born from the belief that early English statutes did not have punctuation marks and thus should not be considered when added later on.[16] That belief is not true. Punctuation has appeared in the Statutes of the Realm "from the earliest days," for "the statutes were intended primarily as a written record, and generally—only incidentally for oral delivery."[17] However, there was a valid concern about how punctuation was inserted into the statutes.

Originally, marks were inserted into written works to indicate pauses for a reader.[18] Those marks were not standardized, and could range from "heavily punctuated with apparent care" to "completely without punctuation."[19] Later on, British law was enacted and transcribed by scriveners[20] and printers,[21] who punctuated "[i]f there was a compelling reason for punctuation."[22] So, using their own determinations, these aides and publishers might alter the phrasing of law. Naturally, this was a problem, for those post facto punctuators were not elected members of Parliament.[23] And one version of a statute could be published in more than one way. More worrisome was that "[w]hat passed for a statute in court might or might not be the original and frequently was not even an accurate copy."[24] The argument goes that printers' and scriveners' views of proper punctuation should not bind English subjects to an unintended meaning. That argument is correct.

And so it was ruled. In *Barrow v. Wadkin*,[25] the issue was whether a statute read "*aliens,* duties, customs, and impositions," or "*aliens'* duties, customs, and impositions."[26] Did the statute refer to aliens or their duties? One edition of the statute read the first way and another favored the second way.[27] After the original draft of the statute provided no help, the Master of the Rolls declared that "in the Rolls of Parliament the words are never punctuated" and went on to determine

---

[16] *See, e.g.*, David S. Yellin, *The Elements of Constitutional Style: A Comprehensive Analysis of Punctuation in the Constitution*, 79 TENN. L. REV. 687, 705 (2012); J.G. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION 307 (1891); E.E. BROSSARD, PUNCTUATION OF STATUTES 4 (1938).

[17] DAVID MELLINKOFF, THE LANGUAGE OF THE LAW 159 (1963); Richard C. Wydick, *Should Lawyers Punctuate?*, 1 SCRIBES J. LEGAL WRITING 7, 17–19 (1990 (crediting Mellinkoff with discrediting this theory); *see also* Statute made at Northampton 1328, 2 Edw. 3 c. 2–7 (Eng.) (displaying clear commas, semicolons, and other punctuation). Further, Professors Wydick and Mellinkoff have examined handwritten statutes and discovered marks resembling punctuation. Wydick, *supra*, at 18 n.43. This demonstrates that printed and original acts have marks indicating punctuation. In fact, William the Conqueror's *Domesday Book* is "heavily dotted" with punctuation. MELLINKOFF, *supra*, at 159 ("From William's day on to the introduction of printing in England . . . it is possible to trace through legal writings . . . the same developments in punctuation [as in nonlegal writing].").

[18] MELLINKOFF, *supra* note 17, at 152–53.

[19] *Id.*

[20] BARBARA M.H. STRANG, THE HISTORY OF ENGLISH 107–10 (1970); *see also* James E. Pfander, Marbury*, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1541 (2001) (describing those editors as "clerks and compliers").

[21] MELLINKOFF, *supra* note 17, at 163; LINDA D. JELLUM, MASTERING STATUTORY INTERPRETATION 103 (2013).

[22] MELLINKOFF, *supra* note 17, at 161.

[23] *See* SUTHERLAND, *supra* note 16, at 307 ("[W]hen bills are not printed and furnished in their perfected form to members of the legislative body . . . the punctuation . . . does not receive the attention of individual legislators . . . .").

[24] MELLINKOFF, *supra* note 17, at 162.

[25] Barrow v. Wadkin [1857] 53 Eng. Rep. 384 (Rolls Court).

[26] *Id.* at 385 (emphasis added).

[27] *Id.*

the case using the "spirit and object of the act."[28] Although the statute's punctuation was the primary issue, the court did not decide whether the mark was an apostrophe or comma. Instead, the court disfavored punctuation altogether and inadvertently began a canon based on a falsehood.[29] This punctuation should have been discarded, not because the "words are never punctuated," but because of the dueling versions.

In 1917, however, the King's Bench reexamined the presumption about early statutes and punctuation. As it was written, the Treason Act of 1351 punishes any man who would "be adherent to the King's Enemies in his Realm, giving to them Aid and Comfort in the Realm, or elsewhere . . . ."[30] Sir Roger Casement was one such man, convicted of conspiring with the Germans, while in Germany, to smuggle weapons into Ireland to be used for a revolution.[31] Casement's lawyer said that because statutes were not punctuated, the crime was limited to treason committed *inside the King's realm only*.[32] The Crown, however, argued that parentheses were inserted around "giving to them Aid and Comfort in the Realm" such that the statute also applied to subjects committing treason *outside the realm*.[33] In determining this case on appeal, Judge Darling closely examined the original Treason Act with a literal magnifying glass and commented that there "may not be brackets, but there is a very distinct line drawn right through the line of writing . . . where we should now perhaps . . . put breaks in the print."[34] And Judge Atkins replied that "they really are to represent commas; they are reproduced in the reprint of the Statue as commas. The Statute Roll is reprinted exactly correctly."[35] While Casement's lawyer responded that the ambiguity should favor the defendant,[36] Casement was eventually "hanged by a comma."[37] Though only one of the reasons why Casement's conviction was affirmed, this discussion casts strong doubt on the presumptions made in *Barrow* and its progeny concerning punctuation. But since *Casement* was decided in the 1900s instead of the early English period, it became the common view that punctuation "lack[s] the legal status of words" because the Rolls were not

[28] *Id.* Aside from the statute he examined for this case, the Master of the Rolls cited no support bolstering his broad statement about statutes and punctuation.
[29] *See* CONG. RSCH. SERV., STATUTORY INTERPRETATION AND RECENT TRENDS 11 (2014) (describing how an English rule established that punctuation was not part of a statute in early cases); MELLINKOFF, *supra* note 17, at 163; note 17, *supra*.
[30] Treason Act 1351, 25 Edw. 3 Stat. 5 c. 2 (Eng.).
[31] R v. Casement [1917] 1 K.B. 98, 99–103.
[32] *Id.* at 113 ("The meaning of that statute, as of all statutes, is to be derived from the words read in their natural sense unelucidated or unobscured by the counsel of commentators however eminent. The words are 'be adherent . . . within the realm.' No authority short of a judgment can compel this Court to say that those words mean 'be adherent . . . without the realm.'").
[33] MELLINKOFF, *supra* note 17, at 168.
[34] *Id.* at 169 (quoting R v. Casement (1917), 86 L.J.K.B. 482, 486 (C.A. 1916).
[35] *Id.*
[36] *Id.*
[37] *See* Seosamh Gráinséir, *Irish Legal Heritage: Hanged by a Comma*, IRISH LEGAL NEWS (Sept. 10, 2018), https://www.irishlegal.com/articles/irish-legal-heritage-hanged-by-a-comma; *see also* Mark Anderson, *Hanged on a Comma: Drafting Can Be a Matter of Life and Death*, IP DRAUGHTS (Oct. 14, 2013), https://ipdraughts.wordpress.com/2013/10/14/hanged-on-a-comma-drafting-can-be-a-matter-of-life-and-death/. However, there were other arguments put forth during the trial, especially given the uncertainty regarding the mark, and this discussion of language did not make it into the final opinion. *See* Dennis Baron, *Commas Don't Kill People*, THE WEB OF LANGUAGE (July 23, 2019, 3:45 PM), https://blogs.illinois.edu/view/25/801468 (arguing that the context matters when deciding whether to kill by grammar); MELLINKOFF, *supra* note 17, at 170.

punctuated, not because they were undemocratically included.[38] Hundreds of years later, there remains a legacy of lackluster legal punctuation in England.[39]

B. THE AMERICAN COMPROMISE

The early American legal community departed from the aforementioned early British model in some ways while still retaining a wariness towards punctation. From the start, drafters like Thomas Jefferson and John Adams grew to dislike the "long sentence" that was indicative of the British statute.[40] Jefferson wrote that such statutes are "really rendered more perplexed and incomprehensible, not only to common readers, but to the lawyers themselves."[41] As a whole, however, writers in the Founding Era were perceived not to "care" about punctuation.[42]

The drafters of the Constitution of the United States depart from this perception. The original Constitution features 140 periods, nine dashes, five sets of parentheses, 375 commas, 65 semicolons, ten colons and em-dashes, and one set of quotation marks.[43] And they matter, for one semicolon could drastically change the meaning of a provision.[44] The idea that "the Framers paid attention to seemingly small matters of interpretation" and were "contentious draftsmen who generally paid attention to fine distinctions"[45] is bolstered by the activities of the Committee of Style. Formed during the Constitutional Convention, the Committee was tasked to "revise the stile [sic] of and arrange the articles which had been agreed to by the [Convention]"[46] so as to create a cleaner and more presentable final product.[47] This necessarily included the punctuation of the Constitution.[48] Gouverneur Morris, the Committee's principle draftsman and possibly a "dishonest scrivener," attempted to change the meaning of the General Welfare Clause by

---

[38] Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 258 (2000). Note that the original Roll in the *Casement* case did have indications of punctuation, which that Court thought were "correctly" transferred to the reproductions of the statute. *Id.* at 169 (quoting R. v. Casement (1917), 86 L.J.K.B. 482, 486 (C.A. 1916)).

[39] *See* RONALD L. GOLDFARB & JAMES C. RAYMOND, CLEAR UNDERSTANDINGS: A GUIDE TO LEGAL WRITING 46–47 (1982) (comparing a British contract to an American one, and saying that the British one "[made] do without any punctuation at all" due a different cultural understanding).

[40] MELLINKOFF, *supra* note 17, at 252.

[41] *Id.* at 253 (quoting 1 THE WRITINGS OF THOMAS JEFFERSON 65 (Lipscomb, ed. 1905)).

[42] *See, e.g.*, *id.* at 250.

[43] *See* Vesan Kesavan & Michael Stokes Paulsen, *Is West Virginia Constitutional?*, 90 CALIF. L. REV. 291, 334 (2002); Yellin, *supra* note 16, at 718.

[44] For possible implications and interpretations of certain semicolons, see generally Michael Nardella, Note, *Knowing When to Stop: Is the Punctuation in the Constitution Based on Sound or Sense?*, 59 FLA. L. REV. 667 (2007); Kesavan & Paulsen, *supra* note 34.

[45] Kesavan & Paulsen, *supra* note 43, at 337.

[46] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 553 (Max Ferrand, ed. 1966).

[47] For instance, the Committee turned twenty-seven approved articles into the seven articles of the original Constitution. John R. Vile, *The Critical Role of Committees at the U.S. Constitutional Convention of 1787*, 48 AM. J. LEGAL HIST. 145, 171 (2006). There is an ongoing debate concerning the differences between the Committee draft and the one voted on by the Convention, which this Note does not opine on. *See* William Traenor, *Academic Highlight: The Framers' Intent: Gouverneur Morris, the Committee of Style and the Creation of the Federalist Constitution*, SCOTUSBLOG (Aug. 5, 2019, 10:08 AM), https://www.scotusblog.com/2019/08/the-framers-intent-gouverneur-morris-the-committee-of-style-and-the-creation-of-the-federalist-constitution/; David S. Schwartz, *The Committee of Style and the Federalist Constitution*, 70 BUFF. L. REV. 781, 791 (2022).

[48] Famously, for example, the Committee changed "We the people of the States," which was then followed by a list of the states, to "We the People, of the United States." Vile, *supra* note 47, at 172; Schwartz, *supra* note 47, at 789.

changing a comma to a semicolon,[49] and succeeded in changing a comma to a semicolon in Article IV Section 3.[50] While the first version creates new states with the approval of the state's legislature and Congress, the Committee's version disallows the creation of states by partitioning other states.[51] This discussion highlights the work one punctuation mark can do in interpretive work and demonstrates that officials were aware of these marks. Indeed, the Committee of Style had three days to approve the new draft.[52] But despite the valued role of punctuation in constitutional drafting, the early American courts primarily clung to the British convention when examining statutes.

This analysis starts with Chief Justice John Marshall. Riding circuit in 1828, the Chief Justice presided over *Black v. Scott*, a case concerning a statute requiring that "[t]he estate of a guardian or curator, appointed under this act . . . shall be liable for whatever may be due from him or her . . . ."[53] Read this way, with the comma inserted after "curator," the liability would attach to both guardians *and* curators. The statute, however, was interpreted to mean the opposite. The Chief Justice wrote:

> [I]n the printed code, the comma is place[d] after the word, "curator," so as to connect the guardian with the curator, and apply the [subsequent] words equally to both. I am, however, aware, that not much stress is to be laid on this circumstance; and that *the construction of a sentence in a legislative act does not depend on its pointing*. The legislature can scarcely be supposed to have intended to distinguish between remedies for debts from testamentary and statutory guardians, and I am, therefore, disposed to read the act with the comma after the word "guardian."[54]

In essence, the Chief Justice explicitly discarded a comma to rewrite the statute and disconnect "curator" from "guardian." This might be permissible in a context in which outside scriveners and printers controlled punctuation, but that was no longer the case. As demonstrated above,

---

[49] *See, e.g.*, 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 46, at 379; William Michael Traenor, *The Case of the Dishonest Scrivener: Gouverneur Morris and the Creation of the Federalist Constitution*, 120 MICH. L. REV. 1, 5 (2021). This change would have "convert[ed] a limitation on the taxing authority into a broad positive grant of power." *Id.*

[50] *See id.* at 98–102; Traenor, *supra* note 49. Morris did much more than change punctuation. In fact, he added the words "herein granted" to the Vesting Clause in Article I, but not in Article II. Traenor, *supra* note 49, at 59–67. This difference would later serve as the basis for decisions involving executive removal power, among other important subjects. *See, e.g.*, United States v. Myers, 272 U.S. 52, 138 (1926). For more examples contrasting the Convention proceedings and the Committee of Style drafts, see William Michael Traenor, *Taking the Text Too Seriously: Modern Textualism, Original Meaning, and the case of Amar's Bill of Rights*, 106 MICH. L. REV. 487, 507–08 (2007) and see generally Traenor, *supra* note 49.

[51] Traenor, *supra* note 49, at 99–100; 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 37, at 454–55; U.S. CONST. Art. IV. § 3 cl. 1. "A literal reading of Morris's text would have barred the admission of the slave state of Kentucky . . . and Tennessee." Traenor, *supra* note 49, at 100. See generally Kesavan & Paulsen, *supra* note 43 for the application of this reading to West Virginia.

[52] Schwartz, *supra* note 47, at 783; 5 THE PAPERS OF GEORGE WASHINGTON, CONFEDERATION SERIES 324 (W.W. Abbott & Dorothy Twohig, eds., 1997). There may be worthwhile objections concerning the role of "printers and engrossers" in the distributed Constitution, Schwartz, *supra* note 47, at 788 n.15, but the fact still remains that founders like Morris and his Committee toiled over and changed punctuation marks, and that those changes were eventually approved.

[53] Black v. Scott, 3 F. Cas. 507, 508 (Marshall, Circuit Justice, C.C.D. Va. 1828) (No. 1,464).

[54] *Id.* at 510 (emphasis added). *But see* Pfander, *supra* note 20 at 1549, for an account suggesting that Marshall heeded the punctuation of the Judiciary Act of 1789 when deciding *Marbury*.

legislators at this time were aware of the effects of punctuation marks,[55] and it was "presumed that the writer intended to be understood according to the grammatical purposes of the language he has employed," and even if read aloud before passage, it was assumed "that the principal points [were] observed in the reading."[56] In other words, the Legislatures had no excuse to ignore punctuation since the final printed punctuation was the same as in the final statute. The judicial standard, however, became "habitual" in following the British tradition of neglecting punctuation,[57] even while other "American men of letters experimented with nuances in literary fashion."[58]

While the British approach was still dominant, it was showing cracks in its foundation. In 1837, the Supreme Court declared in *Ewing's Lessee v. Burnet*[59] that "[p]unctuation is a most fallible standard by which to interpret a writing; it may be resorted to when all other means fail; but the Court will first take the instrument by its four corners." To the Court's credit, *Ewing's Lessee* was a step taken in the right direction. Instead of a blanket statement against the consideration of punctuation, it was said that it may be used when all other means fail.[60] This was the beginning of the end for the early English approach, but it was not gone yet. In deciding a contract case, for instance, the Eighth Circuit, citing *Ewing's Lessee*, said that "[p]unctuation is no part of the English language" and that "it is always subordinate to the text, and is never allowed to control its meaning."[61] Though the circuit court case was about a contract and not a statute, it demonstrated that the legal community was not yet ready to let go of the British approach.

This uncertain trend continued into the 20th century. At first, the Supreme Court stuck with *Ewing's Lessee*. In *Barrett v. Van Pelt*, a case decided in 1925, the Court said that "[p]unctuation is a minor, and not a controlling element in interpretation, and courts will disregard the punctuation of a statute, or repunctuate it, if need be to give effect to what otherwise appears to be its purpose and true meaning."[62] In this reading, like in *Ewing's Lessee*, punctuation mattered, but only in very narrow circumstances; where all other methods fail. Using this standard, it was unlikely for punctuation to be considered seriously given that it could be changed to conform with subjective views concerning the "purpose" of a statute. It still, however, allowed for more consideration than was previously given.

But then, in *United States v. Shreveport Grain and Elevator Company*,[63] the Court laid down a broad rule: "[p]unctuation marks are no part of an act. To determine the intent of the law, the court, in construing a statute, will disregard the punctuation, or will repunctuate, if that be necessary, in order to arrive at the natural meaning of the words employed."[64] The tension between *Shreveport* and *Ewing's Lessee* was evident in legal guides at that time. While some guides said that "when the intention of the statute and the punctuation thereof are in conflict, the former must

---

[55] *See* notes X–X and accompanying text.
[56] SUTHERLAND, *supra* note 16, at 307.
[57] MELLINKOFF, *supra* note 17, at 250.
[58] *Id.* at 252.
[59] Ewing's Lessee v. Burnet, 36 U.S. (11 Pet.) 41 (1837).
[60] To be sure, it is not a large step in the right direction. After all, punctuation is more clearly within the "four corners" of a statute than the legislature's purpose is.
[61] Holmes v. Phoenix Ins. Co. of Brooklyn, 98 F. 240, 241–42 (8th Cir. 1899).
[62] Barrett v. Van Pelt, 268 U.S. 85, 91 (1925).
[63] United States v. Shreveport Grain & Elevator Co., 287 U.S. 77 (1932).
[64] *Id.* at 85; *see also* Costanzo v. Tillinghast, 287 U.S. 341, 344 (1932) ("It has often been said that punctuation is not decisive of the construction of a statute. . . . Upon like principle we should not apply the rules of syntax to defeat the evident legislative intent.") (citations omitted).

control,"[65] others said that punctuation "may afford some indication of [intent], even decide it."[66] The two perspectives even became one of Karl Llewellyn's famous pairs of opposing canons of construction.[67]

In summation, the early American period had created a compromise between the British tradition banning punctuation in interpretation and the understanding that such a strict rule was becoming less tenable.[68] Where there was once a no-tolerance policy, an "emergency only" option was introduced through *Ewing's Lessee*. Though *Shreveport* tried to claw that exception back, the view that "[p]unctuating is interpreting"[69] became increasingly popular. But it was not until the textualist renaissance that punctuation got the full interpretive credit it deserved.

C. TEXTUALISM AND PUNCTUATION'S REDEMPTION

The judicial philosophy of textualism openly favors the punctuation of a statute over the legal traditions described above. Popularized by Judge Easterbrook and Justice Scalia in the 1980s and 90s, textualists generally hold that the text of a statute governs its interpretation since the legislature voted and compromised for that text, not the statute's supposed purpose(s).[70] As Justice Scalia wrote, "[t]he text is the law, and it is the text that must be observed."[71] This philosophy remains dominant today[72] and incorporates punctuation into the interpretive calculation.

---

[65] EARL T. CRAWFORD, THE CONSTRUCTION OF STATUTES § 199 (1940); *see also, e.g.*, ARTHUR LEMHOFF, COMMENTS, CASES, AND OTHER MATERIALS ON LEGISLATION 579 (1949) ("Punctuation is no part of an act."); BROSSARD, *supra* note 16, at 10, 23 ("It would be simpler and better to make no pretense of depending upon punctuation . . . ."). The British method, meanwhile, predictably falls into this camp. *See* EDWARD BEAL, CARDINAL RULES OF LEGAL INTERPRETATION 301 (A.E. Randall, ed., 1924) (Eng.).

[66] SUTHERLAND, *supra* note 16, at 308; *see also, e.g.*, FRANCES J. MCCAFFREY, STATUTORY CONSTRUCTION §§ 22–26 (1953) ("More and more, judges are giving consideration to the marks of punctuation . . . ."); United States v. Marshall Field & Co., 18 C.C.P.A. 228 (1930) ("[M]arks do have their place in ascertaining the meaning of language."). One draftsman of the Illinois constitution wrote that punctuation in legal documents would depend on how masculine they are and how they contribute to the "rugged and bold" search for meaning to which only words may contribute. Urban A. Lavery, *Punctuation in the Law*, 9 AM. BAR ASS'N J. 225, 225, 227–28 (1924).

[67] Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be* Construed, 3 VAND. L. REV. 395, 401, 405 (1950) (The "thrust[ing]" canon is that "Punctuation will govern when a statute is open to two constructions" and the "parry[ing]" canon is that "Punctuation marks will not control the plain and evident meaning of language.").

[68] *See* MELLINKOFF, *supra* note 17, at 368 ("The tug of the past is so strong that few courts will come right out and confess that the traditional snobbery toward punctuation has made a mess of legal writing. Instead we are treated to exercises in gamesmanship demonstrating how to ignore punctuation while really using it."). And the drafters at the Constitutional Convention would likely not have worried about punctuation if it did not matter. Instead, they formed and examined the work of the Committee of Style, further indicating that there was a baseline understanding that the British tradition was not a realistic blueprint. *See supra* notes 46–52 and accompanying text.

[69] BROSSARD, *supra* note 16, at 23 ("[H]e who points a statute thereby puts his construction upon it.").

[70] *See, e.g.*, John F. Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 73–74 (2006); Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347, 351–57 (2005); Caroline Bermeo Newcombe, *Textualism: Definition, and 20 Reasons Why Textualism is Preferrable to Other Methods of Statutory Interpretation*, 87 MO. L. REV. 139, 142–47 (2022). This Note does not delve into the role of punctuation in opposing schools of statutory interpretation given the dominance of textualism in today's judiciary.

[71] Antonin Scalia, *Common-Law Courts in a Civil Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 22 (Amy Gutmann, ed., 1997).

[72] *See, e.g.*, Harvard Law School, *The 2015 Scalia Lecture | A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg ("We are all textualists now."); Adam J. White, Opinion, *Judge Ketanji Brown Jackson May Have Set a New Standard for Future*

Statutory punctuation, in this context, is necessarily scrutinized because it is presumed that "Congress follows ordinary rules of punctuation and that the placement of every punctation mark is potentially significant."[73] "Indeed," say Professors Manning and Stephenson, "as the textualist influence in the judiciary has grown, courts have not hesitated to emphasize rules of grammar and proper punctuation in determining the meaning of legislation, treating those elements of a statute's 'plain meaning.'"[74] And Justice Scalia and Bryan A. Garner said that "[n]o intelligent construction of a text can ignore its punctuation" because "while [it] will rarely change the meaning of a word, . . . it will often determine whether a modifying phrase or clause applies to all that preceded it or only to a part."[75] No matter how punctuation ends up affecting the meaning of a statute, however, textualist philosophy has changed the landscape, for it became apparent that "the modern trend is for judges to be willing to take punctuation into account."[76] Both the British tradition dismissing punctuation marks and the early American "emergencies only" compromise are thus dead in the age of textualism.[77]

The death certificate was handed down by the Supreme Court itself[78] when it said that the "meaning of a statute will typically heed the commands of its punctuation."[79] A classic case illustrating the importance of punctuation in the textualist renaissance is *United States v. Ron Pair Enterprises, Inc*.[80] That case dealt with Section 506(b) of the Bankruptcy Code, which "allows a

---

Nominees, CNN (Mar. 24, 2022), https://www.cnn.com/2022/03/24/opinions/scotus-hearing-jackson-new-precedent-white/index.html; Anita Krishnakumar, *Academic Highlight:* Hyatt *is Latest Example of Textualist-Originalist Justices' Willingness to Overturn Precedent*, SCOTUSBLOG (May 24, 2019, 10:20 AM), https://www.scotusblog.com/2019/05/academic-highlight-hyatt-is-latest-example-of-textualist-originalist-justices-willingness-to-overturn-precedent/ (placing Justices on a textualist "spectrum").

[73] William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621, 664 (1990).

[74] JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION: CASES AND MATERIALS 182 (2021) (citing Int'l Primate Prot. League v. Adm'rs of Tulane Educ. Fund, 500 U.S. 72, 80 (1991) and then United States v. Ron Pair Enters., Inc., 489 U.S. 235, 241–42 (1989), each of which deal with the interpretation of a comma). Professors Manning and Stephenson also suggest that cases "minimizing punctuation" might be products of "an era in which the Court paid less attention to the semantic import of the statutory text." *Id.* at 183. Finally, they deny the *Ewing's Lessee* standard, saying that punctuation should not just be used when other means fail, but in all cases, since "the body of a legal instrument cannot be found to have a 'clear meaning' without taking into account its punctuation." *Id.* at 162.

[75] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 161 (2012). They also cite incidents where punctuation has cost governments millions. *Id.* at 162–64.

[76] JIM EVANS, STATUTORY INTERPRETATION: PROBLEMS OF COMMUNICATION 276–77 (1988) ("There is no good reason at all why punctuation should be ignored . . . ."). In a mirror image of the *Casement* case, for example, Judge Chasanow of Maryland spared a killer of a death sentence for want of a comma. *See* John Fienstein, *Archard Girl's Slayer Gets Life Term*, WASH. POST (May 16, 1979), https://www.washingtonpost.com/archive/local/1979/05/16/archard-girls-slayer-gets-life-term/f84c93f8-abe1-4da6-940c-3787938950aa/.

[77] *See* SCALIA & GARNER, *supra* note 75, at 161–62. Contract law somewhat follows this textualist trend. *See* Mark Cooney, *Style is Substance: Collected Cases Showing Why It Matters*, 14 SCRIBES J. LEGAL WRITING 1, 44 (2011–2012) (citing Favell v. United States, 16 Cl. Ct. 700, 722 (1989) and then Davis v. Pletcher, 727 S.W.2d 29, 33 (Tex. App. 1987)). *But see* Banco Espirito Santo v. Concessionaria Do Rodoanel Oeste S.A., 951 N.Y.S.2d 19, 26 (N.Y. App. Div. 2012) ("Punctuation is always subordinate to the text and is never allowed to control its meaning."). This tension makes more sense in contract law, where the intention between the contracting parties is probably easier to discern than the intentions and purposes of an entire representative legislature. In any event, this Note's thesis regarding punctuation and parentheses is limited to *statutory* interpretation.

[78] The lower courts, however, also helped lay the past doctrine to rest. *See* O'Connor v. Oakhurst Dairy, 851 F.3d 69 (2017) ("For want of a comma, we have this case.").

[79] Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 454 (1993).

[80] United States v. Ron Pair Enters., Inc., 489 U.S. 235 (1989).

holder of an oversecured claim to recover, in addition to the prepetition amount of the claim, 'interest on such claim, and any reasonable fees, costs, or charges provided for under the agreement under which such claim arose.'"[81] Interpreting the statute, the Court found that the comma after "claim" separates the two types of recovery: the interest, and the fees, costs, or charges.[82] Thus, "the natural reading of the phrase entitles the holder of an oversecured claim to postpetition interest and, in addition, gives one having a secured claim created pursuant to an agreement the right to reasonable fees, costs, and charges provided for in that agreement."[83] Therefore, the interest was "unqualified."[84] Dissenting, Justice O'Connor cited early American cases and came to the conclusion that "the Court has not hesitated in the past to change or ignore the punctuation in legislation,"[85] but a victorious 5–4 textualist majority showed the Court was heading in a different direction. In their words, "the language and punctuation Congress used cannot be read in any other way."[86] Punctuation mattered, even though it was "contrary to conventional scholarly wisdom and the perceived 'intent' of Congress."[87] The drafting conventions took note and hammered the final nails into the coffins of *Ewing's Lessee* and the British tradition.[88] And so, the current rule regarding the interpretation of punctuation in statutes is generally that it must be considered.[89]

* * * * *

As this note moves into its discussion of parentheses, it is important to recall how courts have treated punctuation in the past. Since punctuation in statutes was generally discounted, cases involving the parenthesis rarely came before courts, even though this account is ultimately untrue with regard to the parenthesis.[90]

---

[81] *Id.* at 239–40 (quoting 11 U.S.C. § 506(b) (2018)).
[82] *Id.* at 241.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 250 (O'Connor, J, dissenting). Justice O'Connor cited *Ewing's Lessee*, Costanzo v. Tillinghast, 287 U.S. 341, 344 (1932), and *Barrett v. Van Pelt* to make her case. *Ron Pair*, 489 U.S. at 250 (O'Connor, J., dissenting). Each of those cases fall under the "emergencies only" doctrine that became disfavored by the new textualist philosophy.
[86] *Id.* at 242 (majority opinion). Note that the majority was joined by textualist Justices Scalia, Kennedy, and Rehnquist.
[87] Thomas G. Kelch, *An Apology for Plain-Meaning Interpretation of the Bankruptcy Code*, 10 BANKR. DEVS. J. 289, 331–32 (1994) ("While one may believe that the interpretation of punctuation in Ron Pair led to an absurd result, this is not due to the absurdity of adherence to punctuation in interpretation.").
[88] *See e.g.*, GARNER, *supra* note 12, at 3; GOLDFARB & RAYMOND, *supra* note 39, at 42–45; REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING § 8.21 at 188 (1986); ESPENCHIED, *supra* note 15, at 80; EVANS, *supra* note 76, at 276–77; MANNING & STEPHENSON, *supra* note 74, at 182–83; NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 17:15 (2007).
[89] For a well-put summary, see Jack L. Landau, *Oregon Statutory Construction*, 97 OR. L. REV. 583, 670, 681 (2019), in which it is said that "courts generally assume that legislatures intend that statutes be read . . . consistent with . . . punctuation" and that "it is not at all uncommon for courts to ascribe dispositive significance to one punctuation mark."
[90] *See infra* Part IIB.

II. PARENTHESES AS A WRITING CHOICE

Part II focuses on the punctuation mark that gives this Note its title. While the parenthesis might seem like an "opaque"[91] and "incidental"[92] way to impart meaning into a statute, there is more to the story. This part begins by outlining the application of parentheses in normal English and will then consider them in the legal context. At the end of this examination, it is evident that parentheses can help determine the common English meaning of a text, but that the legal community tends to discount and disfavor them.

A. PARENTHESES' ROLE AS PUNCTUATION

The parenthesis was first seen in English writing in the 1300s and became popularized in the Elizabethan era.[93] Parentheses remain popular in poetry,[94] literature,[95] music,[96] and as we will soon see, statutory text[97] (with varying levels of success). The word comes from the Greek *parenthesis*, meaning "put in beside."[98] This makes sense since these punctuation marks separate certain words from the rest of the sentence in which they appear. Generally understood, the "purpose of a parenthesis is ordinarily to insert an illustration, explanation, definition, or additional piece of information of any sort, into a sentence that is logically and grammatically complete without it."[99] It has also been asserted that the words inside the parenthetical are of "theoretically minor importance"[100] and that the marks therefore "deemphasize information" inside.[101]

---

[91] Becerra v. Empire Health Found., 142 S. Ct. 2354, 2365 (2022).
[92] GORDON LOBERGER & KATE SHOUP, WEBSTER'S NEW WORLD ENGLISH GRAMMAR HANDBOOK 170 (2002).
[93] *See* JOHN LENNARD, BUT I DIGRESS: THE EXPLOITATION OF PARENTHESES IN ENGLISH PRINTED VERSE (1991) (tracking the use of parentheses in the context of British poetic history).
[94] In this context, parentheses aid a writer who "wants to insert information into a passage that adds detail." Emma Baldwin, *Parenthesis*, POEM ANALYSIS (2022), https://poemanalysis.com/literary-device/parenthesis/. *See generally* Roi Tartakovsky, *E.E. Cumming's Parentheses: Punctuation as Poetic Device*, 43 STYLE 215 (2009) (delving into the reasons why E.E. Cummings might have used parentheses in his poems and how they add to poems generally); LENNARD, *supra* note 93.
[95] In this context, the parenthetical serves all the purposes it would in any other setting, except maybe statutory language.
[96] In this context, parentheses are used to augment a song title with familiar words so as to remind listeners of the most notable lyrics. There are so many examples of this that it would be possible to create a "parenthesis playlist" with them that would last multiple hours. For notable titles employing this purpose, *see, e.g.*, THE PROCLAIMERS, I'M GONNA BE (500 MILES) (Chrysalis 1988); THE ROLLING STONES, (I CAN'T GET NO) SATISFACTION (London, 1965); ABBA, GIMME! GIMME! GIMME! (A MAN AFTER MIDNIGHT) (Polar Music 1979). This purpose differs from the accepted legal use of parentheses since it seeks to emphasize certain memorable words instead of deemphasizing them.
[97] *See* Part IIB, *infra*.
[98] *Parenthesis*, ONLINE ETYMOLOGY DICTIONARY (2022), https://www.etymonline.com/word/parenthesis.
[99] ERNEST GOWERS, PLAIN WORDS: THEIR ABCS 283 (1955) (Eng.).
[100] H.W. FOWLER & F.G. FOWLER, THE KING'S ENGLISH 279 (1985) (first published 1906).
[101] THE NEW YORK PUBLIC LIBRARY WRITER'S GUIDE TO STYLE AND USAGE 281 (Andrea J. Sutcliffe, et al. eds., 1994). This guide goes on to say that dashes emphasize information and that commas indicate that a phrase is a part

The latter claim is too narrow. The information inside the parenthetical may be removed with no grammatical effect nor logical effect, but it does not follow that such removable information must be relatively unimportant. In fact, its inclusion in the sentence demonstrates that the parenthetical is "too important to either leave out entirely or to put in a footnote or an endnote."[102] And the context and the meaning of the outside words might still be changed by those inside the parentheses. For instance, consider the sentence, "It was a beautiful day in the forest (aside from the incoming logging company) and the woodland animals were frolicking." The removal of this parenthetical would not affect the logic or structure of the outside sentence, but it also previews deforestation and a problem for the animals. This changes the way the sentence is understood. In other words, "a parenthetical can add crucial new information to a sentence without disrupting the flow."[103] The line between important and unimportant parenthetical phrases might depend on the reason it is being used. The parenthesis has multiple uses,[104] and some might indicate more emphasis than others. Three usages are particularly relevant to the legal profession generally. They are described below:

First, parentheticals may be used to provide definitions.[105] For example, "The musician proudly displayed his doodlesack (bagpipes) to the partygoers." Without the parenthetical definition, that example would likely suggest inappropriate conduct to the modern reader, unless he somehow knew the meaning of "doodlesack." With the parentheses, the definition is provided and the reader's understanding of the sentence changed and clarified, and the sentence remains intact. While this might not be important to a defense of the parenthesis in regular writing since definitions remain obvious in most contexts and are thus superfluous parentheticals, they matter a great deal in statutes. When interpreting statutes, one generally looks to definitions as they "suggest that legislatures intended for a term to have a specific meaning that might differ in important ways from its common usage."[106] In other words, the definition of a statute might control its meaning, and so the format in which it is written must also matter. Most statutes include definitions,[107] and those definitions might be explicitly stated or referenced by a parenthetical.[108]

---

of the given sentence. *Id.* This spectrum more closely resembles Bryan A. Garner's view of the parenthesis. *See infra* note 141 (explaining the Garner view of parentheses).

[102] Julia L. McMillan, *Reasons to Use Parentheses*, WRITING COMMONS (2021), https://writingcommons.org/article/using-parentheses/.

[103] Nathaniel George, *Parenthetical Phrases*, UNIV. OF NEV., RENO (Sept. 29, 2020), https://www.unr.edu/writing-speaking-center/student-resources/writing-speaking-resources/parenthetical-phrases.

[104] *See, e.g.*, OXFORD ENG. DICTIONARY, *Parentheses* (2022), https://www-oed-com.proxy.library.nd.edu/view/Entry/137834?rskey=DayMNG&result=2#eid (describing parentheticals as "an explanation, afterthought, or aside"); Mark Nichol, *15 Purposes for Parentheses*, DAILY WRITING TIPS (May 4, 2011), https://www.dailywritingtips.com/15-purposes-for-parentheses/; McMillan, *supra* note 102 ("Since there are many reasons to use parentheses, be sure that the function of parentheses is always made clear to your readers.").

[105] *See, e.g.*, GOWERS, *supra* note 99, at 283.

[106] Katherine Clark & Matthew Connolly, *A Guide to Reading, Interpreting and Applying Statutes*, GEORGETOWN UNIV. L. CTR. 2 (2017); *see also* Chris Micheli, *The Use of Definitions in Legislation*, CAL. GLOBE (Nov. 6, 2020), https://californiaglobe.com/articles/the-use-of-definitions-in-legislation/; GOV'T OF CAN., *Legistics Definitions* (Aug. 29, 2022), https://www.justice.gc.ca/eng/rp-pr/csj-sjc/legis-redact/legistics/p1p5.html; Jeanne Frazier Price, *Wagging, Not Barking: Statutory Definitions*, 60 CLEVELAND STATE L. REV. 999, 1002–03 (2013) "([Statutory definitions] confer the authority and establish a structure that allows the statute's normative provisions to have effect; they inform and instruct as to how a particular outcome might be achieved or avoided").

[107] *Id.* at 1000.

[108] *E.g.*, 18 U.S.C. § 20 (2018); 6 U.S.C. § 1337a(d) (2018); 42 U.S.C. § 293*l*-1(f) (2018); ARK. CODE ANN. § 28-72-302(a) (2022); IND. CODE § 6-3.6-2-14 (2021); KAN. STAT. ANN. § 79-4605(1) (2022); KY. REV. STAT. ANN. § 368.355 (2022); LA. STAT. ANN. § 47:49 (2022); MASS. GEN. LAWS ANN. Ch. 68A §4 (2022); MINN. STAT.

Second, parentheticals may be used illustratively.[109] This can be done in two ways. The first places an explanatory phrase meant to clarify or contextualize inside a parenthetical, thereby modifying words outside the marks. This is a widely done practice in legal documents and regular writing. For instance, consider these sentences: "The queen and princess (having been brainwashed) demanded that the knight battle the nurse." and "The maps of Blackbeard and Davy Jones (locations of diamonds) are hidden in the Oval Office." Both parentheticals add information that enhances the rest of the sentence and can be removed without damaging the logic and structure of the sentence. The contextual information might still be important. Here, the fact that the royalty is brainwashed relieves them of some responsibility for the unfair duel, and that the maps are useful for only diamond hunting. But there are also degrees of ambiguity. For instance, is the princess the only one brainwashed and does Blackbeard's map lead to something other than diamonds? [110] One could use the "last antecedent rule"[111] to find a favored meaning, but either reading is plausible.

Another illustrative use involves the word "including" inside a parenthetical so as to elaborate what elements might be affected by a sentence. For instance, "The ghoulish attendants (including ghosts, banshees, horned beasts, and bunnies) are to be escorted to the river Styx." Here, the parenthetical illuminates the meaning of attendees for those doing the escorting without committing to an exhaustive list of escortees. The sentence itself is nonexhaustive but the parentheses do commit to a list. This style of parenthetical is often used in statutes[112] and causes controversy when a listed item makes little sense contextually, like the bunnies in the example.[113]

Third, parentheticals may be used to denote exceptions.[114] Used this way, a parenthetical would sever a particular thing or things from the meaning of the outside sentence. Generally, this

---

§ 290.091 (2022); MISS. CODE ANN. § 41-21-97 (2022); MO. REV. STAT. § 376.960 (2022); NEV. REV. STAT. § 81.630 (2022); N.H. REV. STAT. ANN. § 564:22 (2022); N.M. STAT. ANN. § 59A-22-5 (2022); N.Y. EDUC. LAW § 6231(B) (2022); OHIO REV. CODE ANN. § 5747.024 (2022); 42 PA. CONS. STAT. § 303.10 (2022); R.I. GEN. LAWS § 8-8.3-1 (2022); S.C. CODE ANN. § 33-31-150 (2022); S.D. CODIFIED LAWS § 1-44-11 (2022); VT. STAT. ANN. tit. 11, § 561 (2022); VA. CODE ANN. § 13.1-826(D) (2022); WASH. REV. CODE § 24.40.020 (2022); W. VA. CODE § 18B-13-1 (2022). This is not exhaustive.

[109] *See 6.95: Use of Parentheses,* CHI. MANUAL STYLE (2017), https://www.chicagomanualofstyle.org/book/ed17/part2/ch06/psec095.html ("He suspected that the noble gases (helium, neon, etc.) could produce a similar effect."). They are also called "clarifying" parentheses, but clarifications are also illustrations of an event, so the description holds.

[110] There are wide-ranging examples of this use of parentheses in statutes. Since they might take all sorts of forms, a citation to a collection of sections would do little use. However, some such statutes will be analyzed later on. *See* notes 215–19 and accompanying text.

[111] *See* Barnhart v. Thomas, 540 U.S. 20, 26 (2003) ("[A] limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows.").

[112] *E.g.*, 42 U.S.C. § 6985 (2018); 42 U.S.C. §11292 (2018); 42 U.S.C. § 9837 (2018); 20 U.S.C. § 2342 (2018); ALA. CODE § 32-10-8 (2022); CAL. CIV. CODE §1102.6g (2022); COLO. REV. STAT. § 32-11-624 (2022); DEL. CODE ANN. tit. 7, § 6052 (2022); GA. CODE ANN. § 36-71-2 (2022); HAW. REV. STAT. §328-1 (2022); 205 ILL. COMP. STAT. § 620/2-11 (2022); IND. CODE § 3-6-4.2-12.5 (2021); IOWA CODE § 321E.29 (2022); KAN. STAT. ANN. § 12-3802 (2022); LA. STAT. ANN. § 30:548 (2022); MISS. CODE ANN. § 37-23-133 (2022); MONT. CODE ANN. § 22-2-403 (2022); N.Y. PUB. AUTH. LAW § 1299-a (2022); N.C. GEN. STAT. § 78A-27 (2022); 35 PA. CONS. STAT. § 770.3 (2022); 23 R.I. GEN LAWS § 23-24.10-3 (2022); S.C. CODE ANN. § 50-13-665 (2022); S.D. CODIFIED LAWS § 37-6-12 (2022); TENN. CODE ANN. § 39-17-408 (2022); VT. STAT. ANN. tit. 3, § 2471a (2022); W. VA. CODE § 8-23-2. This is not exhaustive.

[113] *See* notes 145–58 and accompanying text.

[114] *See, e.g.*, Jennifer Gunner, *Parenthetical Expressions: Types and Usage in Grammar*, YOUR DICTIONARY (last visited Nov. 1, 2022), https://grammar.yourdictionary.com/style-and-usage/parenthetical-expression-types-and-usage.html.

use may be identified with indicator words like "except," "but," "other than," and "aside from." For example: "Nothing (except true love's kiss) could awaken Snow White." The author of such statements specifically cuts away certain circumstances, indicating his consideration of those possibilities. Given that nature of specificity, it makes sense that the federal government and most states use exempting parentheticals and a variety of indicator words in statutes.[115] It also emphasizes the point that words inside the parentheses can be critical to the meaning of a sentence; not taking note of exceptions is a mistake in any playbook.

This Section demonstrated that the parenthesis can be a useful punctuation mark when a writer seeks to separate information from the main body of a sentence. It has also shown that just because words are put aside does not always mean they are less important. Parentheticals might have weight that changes the ordinary common meaning of a sentence. Legislators often use parentheses when drafting state and federal statutes to create definitions, illustrations, and exceptions. Despite the pervasiveness of the parentheses throughout writing, there is an ongoing legal movement that aims to lessen their inclusion in statutes for fear of creating a festering statutory ambiguity.[116]

B. PARENTHESES IN LEGAL DOCUMENTS

Parentheses offer an interesting challenge in the field of legal drafting. And their history departs from regular story of statutory punctuation. The early English statutes were held to include parenthetical marks in their original drafts.[117] As time went on, those statutes continued to have parentheses included in the original statute, or at least in the reprinted copies, used to demonstrate illustrations and exceptions.[118] This is especially interesting since parentheses were the exception

---

[115] *See, e.g.*, 46 U.S.C. § 7313 (2018) ("[E]ndorsement . . . (except vessels operating on rivers or lakes (except the Great Lakes)) may be prescribed by regulation."); 39 U.S.C. § 3626 (2018); 7 U.S.C. § 1387 (2018); 5 U.S.C. § 7342 (2018); ALA. CODE § 25-4-130 (2022); ALASKA STAT. § 45.07.504 (2021); ARK. CODE ANN. § 3-4-602 (2022); CAL. COM. CODE § 9109 (2022); COLO. REV. STAT. § 32-11-221 (2022); DEL. CODE ANN. tit 5, § 702 (2022); FLA. STAT. §625.031 (2022); GA. CODE ANN. § 48-2-33 (2022); HAW. REV. STAT. § 803-47.6 (2022); IDAHO CODE § 23-912 (2022); 220 ILL. COMP. STAT. 15/6 (2022); IND. CODE § 16-44-2-5 (2021); IOWA CODE §554.9317 (2022); KAN. STAT. ANN. § 75-2935 (2022); KY. REV. STAT. ANN. § 66.523 (2022); LA. STAT. ANN. § 3:3761 (2022); MD. CODE ANN., COM. LAW § 9-317 (2022); MASS. GEN. LAWS ch. 106, § 9-317 (2022); MICH. COMP. LAWS § 123.155 (2022); MINN. STAT. § 336.7-103 (2022); MISS. CODE ANN. § 27-9-13 (2022); MONT. CODE. ANN. § 50-31-103 (2022); NEB. REV. STAT. § 21-19, 131 (2022); NEV. REV. STAT. § 612.142 (2022); N.H. REV. STAT. ANN. §146:2 (2022); N.M. STAT. ANN. § 5-5-5 (2022); N.Y. ELEC. LAW § 2-122 (2022); N.C. GEN. STAT. § 58-7-15 (2022); N.D. CENT. CODE § 9-02-02 (2022); OHIO REV. CODE ANN. § 1303.26 (2022); OKLA. STAT. tit. 47, § 156.3 (2022); OR. REV. STAT. § 663.145 (2022); 16 PA. CONS. STAT. § 4520 (2022); 42 R.I. GEN LAWS § 42-116-31 (2022); S.C. CODE ANN. § 39-15-1150 (2022); S.D. CODIFIED LAWS § 37-6-12 (2022); TENN. CODE ANN. § 47-18-702 (2022); UTAH CODE ANN. §59-7-302 (2022); VT. STAT. ANN. tit. 7, §975 (2022); VA. CODE ANN. §58.1-341 (2022); W. VA. Code § 611.60 (2022); WYO. STAT. ANN. §35-2-425 (2022). This is not exhaustive.

[116] This does not include the use of parentheses for the enclosure of letters of numbers to indicate sections nor the enclosure of citation information. Both remain unchallenged aspects of legal writing and drafting.

[117] *See* notes 30–37 and accompanying text (describing the use of parentheses in the *Casement* case).

[118] *See, e.g.*, An Act for the Pacification between England and Scotland 1640, 16 Car. C. 17 §1 (Eng.) ("[W]hosoever shall be found upon trial and examination by the Estates of either of the two Parliaments (they judging against the persons subject to theire owne authority) to have been the authors and cause of the late and present troubles . . . ."); An Act Declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne 1688, 1 W. & M. c. 2 § 1 (Eng.) ("[E]very King and Queene of this Realme . . . at the time of his or her takeing the said Oath (which shall first happen) make subscribe and audibly repeate the Declaration mentioned in the Statute . . . ."); An Act to Settle the Trade to Africa 1697, 9 Will. 3, c. 26 § 7 (Eng.) ("to pay Five pounds per

to the general rule; while other marks were extremely uncommon, the parenthesis remained commonly used in the Statutes of the Realm.[119] As a discontented British lawyer, James Burrow, noted, "[T]o put one parenthesis within another is a great Fault in Language: But to *begin* a parenthesis *only*; and then (within that) to *begin another*; and never to end either; is much greater."[120] Burrow also noted, however, that the parenthesis "is of great Use and tends, in my apprehension, very much to perspicuity."[121] Burrow was right in noting both danger and usefulness in the mark.

Early American legal writers similarly used parentheses in the absence of other marks. Jefferson, for instance, wrote that statutes create confusion "from . . . parenthesis within parenthesis, and their multiplied efforts at certainty."[122] The use of parentheses in the long, unpunctuated statute was seen from the first days of the American colonies[123] but diminished after the American Revolution to make way for the regular system of punctuation. Though not a statute, this is best seen in the Constitution's use of punctuation as illustrative or exemptive. For instance, Article II, Section 2 states that the President must "solemnly swear (or affirm)" his oath.[124] Parentheses were also used in early state statutes[125] and legislation from the First Congress,[126] which was liberal with its use of the marks.

Despite their historically common usage, however, the parenthesis recently became embroiled in the normal debate regarding statutory punctuation. This is not because the understanding of punctuation changed,[127] nor because parentheses became less useful.[128] Rather, it is due to their ability to confuse a reader. As Burrow said, it is wrong to omit the use of parentheses, but they might be inadvertently made to "obscure the sentence to which [they are] introduced."[129] Such effects run afoul of a key tenet of interpretation, creating tension between a textualist and originalist view of the parenthesis' role in statutes: if the history and traditional usage of the parenthesis advise its inclusion in a statute but textual clarity advises its exclusion, which viewpoint should govern?

When interpreting a statute, one must give effect "to all its provisions, so that no part will be inoperative or superfluous."[130] Provisions necessarily include punctuation and often include parentheses,[131] and such provisions should be clear to grant them their due effect. Yet punctuation

---

Centum ad valorem at the Place of Importation upon all Goods and Merchandize (Negroes excepted) imported [in] England").

[119] *See, e.g.*, *supra* note 17.

[120] JAMES BURROW, DE USU ET RATIONE INTERPUNGENDI: AN ESSAY ON THE USE OF POINTING 21–22 (1771).

[121] *Id.* at 22.

[122] MELLINKOFF, *supra* note 17, at 253 (quoting 1 THE WRITINGS OF THOMAS JEFFERSON 65 (Lipscomb, ed. 1905)).

[123] *See* THOMAS GATES KNIGHT, VA. CO. OF LONDON, ARTICLES, LAWS, AND ORDERS, DIVINE, POLITIC AND MARITAL FOR THE COLONY OF VIRGINIA (1612) ("[I]f hee die intestate, his goods shall bee put into the store, and being valued by two sufficient praisors, his next of kinne (according to the common Lawes of England)").

[124] U.S. CONST. art. II, § 1; *see also* U.S. CONST. art I, § 8 ("[Congress may] exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square)"). For an illustrative use, see U.S. CONST. art. IV, § 4 ("on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence").

[125] *See, e.g.*, 1787 N.Y. Laws 234 (using an illustrative parenthetical).

[126] *See, e.g.*, 1 Stat. 55 (1789); 1 Stat. 125 (1790); 1 Stat. 131 (1790). This is *far* from exhaustive.

[127] *See* Yellin, *supra* note 16, at 718 ("[T]he Framers used [parentheses] in ways that are both familiar to modem readers and easy to understand.").

[128] *See, e.g.*, Lavery, *supra* note 66, at 228 ("For the draftsman the parentheses are of great importance . . . .").

[129] BURROW, *supra* note 120, at 21–22.

[130] Corely v. United States, 556 U.S. 303, 314 (2009) (quoting Hibbs v. Winn, 542 U.S. 88, 101 (2004)).

[131] *See supra* notes 108, 112 & 118.

has a relatively greater chance of being deemed a scrivener's error,[132] and since parentheses modify sentence structure and references, they contribute to "the biggest source of uncertainty of meaning" in statutes.[133] Thus, when the text is the primary lens of statutory interpretation, the broad use of parentheses presents a problem. Not all punctuating modifiers are equal, however, and some accounts suggest the superiority of the parenthesis in certain circumstances. For instance, one leading book points out that "[p]arentheses, though generally frowned upon, are sometimes more reliable than commas in setting off a phrase when there is possible uncertainty as to how the ideas that follow the phrase are linked to those that precede it."[134] It also discusses how parentheses create clearer demarcations of asides than other marks.[135] Some other guidebooks agree that parentheses may impart clarity,[136] and a Pennsylvania law even codifies that idea.[137]

But the majority of sources disagree. The common wisdom provides "a rule against parentheses" in statutes.[138] The reason supporting the rule is that "[h]ow the courts would treat a parenthetical phrase (as for example on a motion to construe a will), is purely speculative."[139] Instead, they suggest that such illustrations and exemptions be placed at the beginning or end of a sentence in a statute.[140] Moreover, prominent legal writing commentators like Bryan A. Garner subscribe to the view that the words inside the parenthetical are less important to the overall meaning by virtue of their placement.[141] Less important words are dangerous in statutes, for judges typically follow clear statements from Congress,[142] and "afterthoughts" or "asides" might not meet that requirement.[143] A large number of state drafting guides have followed suit, explicitly disfavoring parentheses.[144] Even though this dominant view discredits helpful uses for parentheses

---

[132] SCALIA & GARNER, *supra* note 75, at 164–65.
[133] *See* DICKERSON, *supra* note 88, at § 6.1 at 101, § 8.21 at 188.
[134] *Id.* at § 8.21 at 189.
[135] *Id.* at § 6.1 at 103.
[136] *See, e.g.*, LYNN BAHRYCH & MARJORIE DICK ROMBAUER, LEGAL WRITING IN A NUTSHELL 134–35 (2003); HOWARD DARMSTADTER, HEREOF, THEREOF, AND EVERYWHEREOF: A CONTRARIAN GUIDE TO LEGAL DRAFTING 58–61 (2008).
[137] *See* 101 PA. CODE §15.129 (2022) ("[Parentheses] are sometimes more reliable than commas in setting off a phrase where there is possible uncertainty").
[138] ROBERT N. COOK, LEGAL DRAFTING 31–32 (1951).
[139] ROBERT C. DICK, LEGAL DRAFTING 110 (1972).
[140] *See* COOK, *supra* note 138, at 32 (discussing exemption parentheticals).
[141] BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES 153 (2001); BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE § 1.33–34, 24 (2006); *see also* MORTON S. FREEMAN, THE GRAMMATICAL LAWYER 17 (1979); ESPENCHIED, *supra* note 15, at 96.
[142] *See, e.g.*, Carissa Byrne Hessick & Joseph E. Kennedy, *Criminal Clear Statement Rules*, 97 Wash. U. L. Rev. 351, 376 (2019).
[143] BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE: THE AUTHORITY ON GRAMMAR, USAGE, AND STYLE 1020 (2016)
[144] *See, e.g.*, ALA. LEGIS., *Drafting Rule 11* (2021), https://alison.legislature.state.al.us/legal-division-manual#rule11; STATE OF ARK. BUREAU OF LEGIS. RSCH., LEGISLATIVE DRAFTING MANUAL 48; LEGIS. COMM'RS OFF. OF THE CONN. GEN. ASSEMBLY, MANUAL FOR DRAFTING REGULATIONS 40 (2018); LEGIS. COUNCIL DIV. OF RSCH., DELAWARE LEGISLATIVE DRAFTING MANUAL 97 (2019); KY. GEN. ASSEMBLY, BILL DRAFTING MANUAL 40 (2021); OFF. OF THE REVISOR OF STATUTES, MAINE LEGISLATIVE DRAFTING MANUAL 127 (2016); ALICE E. MOORE & DAVID NAMET, MASSACHUSETTS GENERAL COURT: LEGISLATIVE RESEARCH AND DRAFTING MANUAL 25 (2010); OFF. OF THE REVISOR OF STATUTES, MINNESOTA REVISOR'S MANUAL 313 (2013); N.M. LEGIS. COUNCIL SERV., LEGISLATIVE DRAFTING MANUAL 97 (2015); LEGIS. COUNCIL, NORTH DAKOTA LEGISLATIVE DRAFTING MANUAL 109 (2023); GEN. ASSEMBLY OF TENN. OFF. OF LEGAL SERVS., 2019 LEGISLATIVE DRAFTING GUIDE 14 (2019); TEX. LEGIS. COUNCIL, TEXAS LEGISLATIVE COUNCIL DRAFTING MANUAL 102 (2020). This list not exhaustive, and there exceptions. *See, e.g.*, LEGIS. REFERENCE BUREAU, ILLINOIS BILL DRAFTING MANUAL 237 (2012) ([U]se commas or parentheses to set off an inserted phrase . . . .").

in legal documents and incorrectly assumes parenthetical phrases to be unimportant, it is right in one regard. Courts seem to have trouble determining the weight they should give to matter within parentheses. If the ambiguity faced by courts confronting parentheses is grievous, then the textualist argument against their inclusion holds water, despite the extensive history of the statutory parenthesis.

III. PARENTHESES AND STATUTORY INTERPRETATION IN PRACTICE

This Part examines the interpretation of statutory parentheses in actual court cases. Note that this analysis highlights cases in which the parenthetical statement *contributes* to the ambiguity. If the meaning is clear, there is no reason to consider the expression. The Supreme Court appears to generally disfavor the parenthesis. And yet there is an exception to this generalization. Lower courts, meanwhile, have no predisposition to parentheses and their interpretations vary widely. This parentheses problem is ongoing and there is no reliable guidance for judges.

A. THE SUPREME COURT

The Supreme Court has not explicitly addressed the role of parentheses in statutes. Its opinions, however, reflect the dominant view that parenthetical information should be disfavored. The Court addressed parentheses in the seminal case of *Chickasaw Nation v. United States*.[145] Both the majority and dissent acknowledged that parentheses played a role, but they battled over how much weight marks should be given. The parenthesis lost the battle in both the majority and dissenting opinions.

At stake in *Chickasaw Nation* were tax exemptions for Native American tribes.[146] Specifically, the Court examined language in the Indian Gaming Regulatory Act that reads:

> The provisions of [the Internal Revenue Code] (including sections 1441, 3402(q), 6041, and 60501, and chapter 35 of such [Code]) concerning the reporting and withholding of taxes with respect to the winnings from gaming or wagering operations shall apply to Indian gaming operations conducted pursuant to this chapter . . . .[147]

Two tribes argued that they were exempt from paying Chapter 35 taxes under this law since it was included in the illustrative parenthetical, even though Chapter 35 had nothing to do with the "reporting and withholding" of taxes.[148] A reading of the statute without the parenthetical would clearly have to pay these taxes, but because they were listed a part of the illustration, the tribes argued that Congress intended to include the unrelated chapter to the provision. The parenthetical's illustration was at odds with the rest of the statute. Although the case primarily concerned the Native American substantive canon of construction,[149] the Court discussed the parentheses to determine whether the statute was ambiguous.

---

[145] 534 U.S. 84 (2001).
[146] *Id.* at 86.
[147] *Id.* at 87.
[148] *Id.*
[149] *Id.* at 88.

Writing for the majority, Justice Breyer declined to give the parenthetical controlling weight. He began by saying that the language outside the parentheses was clear, limiting the illustration to items related to reporting and withholding and thereby making the illustration redundant:[150] If the items were already implicated in the outside language, why would examples be necessary to the meaning or effects of the statute? In his words, "the presence of a bad example in a statute does not warrant rewriting the remainder of the statute's language,"[151] especially when Congress would likely have made an exemption explicitly. Finally, the "give effect to each word" canon[152] was found to be inapplicable since Chapter 35 would deny the purpose of the statute and was set aside from the outside language anyway.[153] To the majority, "[a] parenthetical is, after all, a parenthetical, and it cannot be used to overcome the operative terms of a statute."[154] The majority therefore endorsed the normal view of the legal community: parentheses deemphasize information.

Writing for the dissent, Justice O'Connor wrote that the language inside the parenthetical controlled. To her, however, the parentheses themselves were unimportant, mirroring her broad claim in *Ron Pair*.[155] Writing in a more purposivist fashion, O'Connor said that the parentheses, and the punctuation in general, did not matter and could be changed since a close analysis might "distort[] a statute's true meaning."[156] And reading without clear punctuation, she found that, if Congress included the illustration, there was reason to question both interpretations.[157] O'Connor concluded that there is "no generally accepted canon of statutory construction favoring language outside of parentheses to language within them, nor do I think it wise for the Court to adopt one today."[158] The dissent thought the text ambiguous enough to favor the tribes and the substantive canon at issue.

Neither opinion offered the parentheses support. On the one hand, the majority suggested that illustrative parentheticals are superfluous support for information already written. This would contradict traditional usage in favor of an overbroad grammatical understanding. On the other hand, the dissent would move back to the *Ewing's Lessee* days and ignore contrarian but congressionally approved punctuation. It was not until last Term that the Supreme Court substantively addressed the use of statutory parentheticals.[159] In these cases, the Justices mostly steered towards the majority's view in *Chickasaw Nation*, that parentheticals should not control meaning but added a grammatical presumption to the mix.

The first case, *Boechler v. Commissioner*, involved a statute that allows one to "within 30 days of a determination under this section petition the Tax Court for review of [a] determination *(and the Tax Court shall have jurisdiction with respect to such matter)*."[160] The illustrative parentheses here allow a reader to question whether the tax court has jurisdiction over the issue *only during the 30-day period*. Finding the statute ambiguous, the Court turned to the use of

---

[150] *Id.* at 89 ("One would have to read the word 'including' to mean what it does not mean, namely, 'including,' 'and.'")
[151] *Id.* at 90.
[152] *See supra* note 130 and accompanying text.
[153] *Id.* at 93–94.
[154] *Id.* at 95 (quoting Cabell Huntington Hosp., Inc. v. Shalala, 101 F.3d 984, 990 (4th Cir. 1996)).
[155] United States v. Ron Pair Enters., Inc., 489 U.S. 235, 250 (1989) (O'Connor, J, dissenting).
[156] 534 U.S at 98 (O'Connor, J., dissenting) (quoting U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc., 508 U.S. 439, 454 (1994)).
[157] *Id.*
[158] *Id.* (citation omitted).
[159] United States v. Woods, 571 U.S. 31 (2013), did graze the issue, but the interpretation revolved mostly around the meaning of words, not the parenthesis as a punctuation mark. *Id.* at 45–46.
[160] Boechler v. Commissioner, 142 S. Ct. 1493, 1497 (2022) (emphasis added).

parentheses as a punctuation mark and dismissed them out of hand, finding them not to indicate an "express" condition.[161] Quoting Garner, the Court formally took the view that a parenthetical is "typically used to convey an 'aside' or 'after thought.'"[162]

The next case, *Becerra v. Empire Health Foundation*,[163] solidified this renewed disfavoring of parentheses. At issue was a "byzantine" hospital reimbursement statute that said a hospital could be refunded based on a fraction.[164] That fraction is calculated in part by counting "'the number of [a] hospital's patient days' attributable to low-income patients 'who *(for such days)* were entitled to benefits under part A of [Medicare].'"[165] A similar fraction is calculated for Medicaid, and the two are added together to determine a possible refund.[166] The ambiguity involved how Medicare patients are counted in the fraction of days which they are not eligible for payment.[167] The respondent hospital argued that a regulation finding such patients eligible is not reflected in the statutory language.[168] As part of its argument, it read "entitled" to be modified by the parenthetical "(for such days)."[169] This interpretation would mean that a patient must be able to *actually receive* Medicare for their hospital days, rather than simply meeting Medicare's automatic enrollment requirements.

The majority tore that reading apart. Justice Kagan, citing *Boechler*, said that Congress would not wish to change a statutory scheme with parentheses and so "(for such days)" is "incapable of bearing so much interpretive weight."[170] Congress would not change that "settled" statutory definition of being entitled to benefits by using a "subtle, indirect, and opaque" punctuation mark.[171] Instead, that parenthetical works "hand in hand" with the normal definition of entitlement and asks hospitals to include a patient when he is eligible for Medicare on a given day.[172] This makes sense. The parenthetical did not clearly provide a new definition nor did it use exemplifying words to indicate a departure from the common meaning.

Though correctly decided, however, the majority went too far in its treatment of punctuation. The decision could have been narrowly written to disfavor only these particular illustrative marks. Instead, Justice Kagan deemed parentheses to be altogether unhelpful in determining congressional intent by virtue of Garner's incorrect grammatical understanding. Writing for the dissent in this 5–4 case, Justice Kavanaugh addressed this misunderstanding, saying that "[p]arentheticals can be important."[173] To be sure, the parentheses were only a small part of this case and its conclusion, but they nevertheless played a role in both statutory interpretations and underscored disagreement about their importance in hard cases.

Regardless of the Court's poor treatment in *Empire Health*, a majority (that included Justice Kagan) used a parenthetical to establish jurisdiction in *Biden v. Texas*.[174] The provision in

---

[161] *Id.* at 1498.
[162] *Id.* (quoting BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE: THE AUTHORITY ON GRAMMAR, USAGE, AND STYLE 1020 (2016)).
[163] 142 S. Ct. 2354 (2022).
[164] *Id.* at 2362 (quoting Cath. Health Initiatives Iowa Corp. v. Sebelius, 718 F.3d 914, 916 (2013))
[165] *Id.* at 2358 (quoting 42 U.S.C. § 1395ww(d)(5)(f)(vi)(I) (2018) (emphasis added)).
[166] *Id.* at 2360.
[167] *Id.* This would happen, for instance, if a Medicare user had private insurance. *Id.*
[168] *Id.* at 2361.
[169] *Id.* at 2365.
[170] *Id.* (citing Boechler v. Commissioner, 142 S. Ct. 1493, 1498 (2022)).
[171] *Id.*
[172] *Id.*
[173] *Id.* at 2369 (Kavanaugh, J., dissenting) (pointing out Constitution provisions with parentheses).
[174] 142 S. Ct. 2528, 2538 (2022).

question decreed that "no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of [certain immigration statutes]."[175] One issue in this case was whether lower courts had subject matter jurisdiction for such injunctive immigration cases. For the majority, the Chief Justice wrote that "the parenthetical explicitly preserv[ed] this Court's power to enter injunctive relief."[176] It determined that Congress had given the Court a specific "carveout" that permitted the injunctive relief case at bar.[177] To ignore the parenthetical exception that Congress "took pains" to address would be, in the majority's view, to fail the "give effect" presumption of statutory interpretation.[178] And parenthetical exceptions must have use under the "give effect canon" since Congress set the exception apart.

Justice Barrett took a different view. She noted that the majority gave "surprisingly little attention" to the parenthetical, which "does not appear to have an analogue elsewhere in the United States Code."[179] Specifically, the dissent posited that the parenthetical might *illustrate* preexisting jurisdiction rather than provide an *exemption* in certain cases.[180] This ambiguity, among other reasons, is reason enough for the Court to reconsider the parenthetical, despite its "surface appeal."[181] Though the possibility of reconsideration remains in light of the dissent, this case departs from the presumption against parentheses because a parenthetical granting jurisdiction was allowed to control against an otherwise restrictive outside text.

The debate over parentheticals continues today. The Court recently heard arguments in *Sackett v. EPA*,[182] which concerns whether wetlands are navigable waters of the United States. One clue comes from a statute allowing "any State desiring to administer its own . . . program for the discharge of dredged or fill material into the navigable waters (other than those waters which are presently used, including wetlands adjacent thereto) within its jurisdiction" to submit a request for such a program.[183] This law seems to indicate that navigable waters might include wetlands since they were mentioned as an example in the parenthetical. Though there are questions concerning the meaning of "adjacent,"[184] a larger question is whether Congress wished to change or define navigable waters using this parenthetical.[185] The Sacketts maintained that this parenthetical should not be read to control the statutory meaning as it would be "an inversion of statutory interpretation to say that this parenthetical reference in a provision dealing principally with permit . . . changes the scope of the central definitional portion of the Act . . . ."[186] The Sacketts also cited the *Boechler* decision and its adoption of the Garner view in their brief.[187] And, during oral arguments, Justice Alito questioned the use of the parenthetical to provide a "clear statement" of congressional intent.[188] The parenthetical alone might not determine the outcome of this case, but it will likely contribute to the broader discussion.

---

[175] *Id.* (quoting 8 U.S.C. § 1252(f)(1) (2018)).
[176] *Id.* at 2539.
[177] *Id.*
[178] *Id.* (quoting Williams v. Taylor, 529 US. 362, 404 (2000)).
[179] *Id.* at 2561 (Barrett, J., dissenting).
[180] *Id.* at 2562.
[181] *Id.*
[182] Sackett v. EPA, No. 21-454 (Sup. Ct., Oct. 3, 2022).
[183] 33 U.S.C. § 1344 (2018).
[184] *See* Transcript of Oral Argument at 33, *passim*, Sackett v. EPA (Oct. 3, 2022) (No. 21-454).
[185] *See id.* at 27–29.
[186] *Id.* at 57–58.
[187] Reply Brief for Petitioner at 7, Sackett v. EPA, No. 21-454 (Sup. Ct. July 8, 2022).
[188] Transcript of Oral Argument at 106, Sackett v. EPA (Oct. 3, 2022) (No. 21-454).

In summary, these cases demonstrate that the modern, textualist Supreme Court has not firmly determined how parentheses are to be weighed in statutes. Overall, however, it seems as if parentheticals are disfavored in tough cases. *Chickasaw Nation* said it outright regarding conflicting illustrative parentheticals. New decisions defer to Garner's view: that parentheses indicate unimportant asides and should therefore not control meaning. The decision in *Biden v. Texas*, meanwhile, offers the opposite conclusion given the Court's explicit reliance on a parenthetical. The treatment of the parenthesis is an ongoing debate in the Court, and there is no clear trend one way or another from the lower courts in years past.

B. LOWER COURTS

Other courts, state and federal, have both favored and disfavored statutory text in parentheses. Though these rulings predate recent Supreme Court rulings, they still provide helpful insights. And unlike Supreme Court cases, lower courts have acknowledged the different contextual uses of parentheses.[189] As such, this Section will look at the treatment of definitional, exempting, and illustrative parentheses, as explained in Part IIA of this Note.

Beginning with parentheticals defining or very similarly clarifying statutory terms, only one case is worth pointing out. It explicitly favors the use of the marks to carry Congressional meaning. In *United States v. Coscia*,[190] a defendant challenged language that criminally made it unlawful to engage in behavior "known to [his] trade as 'spoofing' (bidding or offering with the intent to cancel the bid or offer before execution)."[191] The defendant argued that the statute did not define "spoofing," but referred to industry terminology because quotation marks were inserted around "spoofing."[192] That argument did not work. The court held that the presence of a parenthetical definition made industry reference "irrelevant."[193] The defendant next relied on *Chickasaw Nation* to disfavor the parenthetical definition. That comparison was flawed. The court wrote that, unlike the surplus, illustrative parentheses in *Chickasaw Nation*, the marks there were used to identify a definition, and that the Supreme Court relied on a parenthetical definition before.[194] Further, the Circuit Court noted that an illustrative use was indicated by the word "including," which was not at issue in their case.[195] Eventually, those parentheses were held to define "spoofing" and were therefore used to uphold the defendant's conviction.[196] In applying definitions, the parenthesis was found to be a helpful interpretive aid.[197]

Lower courts have generally found the same when applying exemptive parentheses. For instance, in *United States v. Thomas*,[198] a court relied on parenthetical information in the U.S. Sentencing Guidelines that discuss drug crimes.[199] The specific wording concerned law "that

---

[189] *See, e.g.*, United States v. Monjaras-Castaneda, 190 F.3d 326, 330 (5th Cir. 1999); *infra* part IIA.
[190] 866 F.3d 782 (7th Cir. 2017).
[191] *Id.* at 791 (quoting 7 U.S.C. § 6c(a)(5) (2018)).
[192] *Id.*
[193] *Id.*
[194] *Id.* at 792 (quoting Lopez v. Gonzales, 549 U.S. 47, 52–53 (2006)). *Lopez* was not included in Part IIIA since the dispute there did not involve the parentheses themselves.
[195] *Id.*
[196] *Id.* at 790–93, 803.
[197] *C.f.* Janssen Pharmaceutica, N.V. v. Eon Labs Mfg., Inc., 134 Fed. Appx. 425, 428 (Fed. Cir. 2012) (understanding parentheses to clarify or define terms in a patent case).
[198] 939 F.3d 1121 (10th Cir. 2019).
[199] *Id.* at 1123.

prohibits the . . . distribution of a controlled substance (or a counterfeit substance)."[200] Noticeably, the use of "or" here, rather than "except" or something similar, makes this an atypical exemption. The effect, however, remains the same; the parenthetical carves out an instance in which the outside language would not control. In *Thomas*, even though there was no controlled substance, the sentence still applied due to the parenthetical exception.[201] The Tenth Circuit, interpreting this text, also distinguished the case from *Chickasaw Nation*. They wrote that the Supreme Court did not consider parentheses as "necessarily surplusage" and that, since the marks were a "central subject" in that case, they should be given "substantive effect" in the guidelines.[202] Unlike the illustrative parenthetical, the court found that the exempting parenthetical in this case was intended to "expand[] the scope of the guidelines to include things that would generally not be considered subsets of the term in its common meaning."[203] Thus, the Guidelines intended the given sentence to apply also to counterfeit drugs. The majority also noted that the parentheses were "more likely to have been for purposes of readability than to signify unimportance."[204]

The dissent would disfavor this parenthetical. First conforming to the broad Garner approach, it says that "the substantive reach of the district court's and majority's reading would seem to merit more than a mere parenthetical."[205] Next, it argues the parenthetical would better "*illustrate or explain* the broader proposition" since an exemptive, expansive meaning would take the definition "too far."[206] The majority counters by writing that "including" would have been used instead of "or" if that view was correct.[207] While the use of "or" is not the clearest way to demonstrate an exception to the outside text, other courts have followed the majority in similar cases involving statutes rather than the Garner approach or *Chickasaw Nation*.[208]

Lower courts have also favored the more straightforward exceptions. In *United States v. Krahenbuhl*,[209] a magistrate judge confirmed that the parenthetical "(and not under the charge and control of the General Services Administration)" created a "statutory exception to the VA statute when the GSA is in control of a facility."[210] And in *Fellows v. City of Los Angeles*,[211] a party challenged their applicability to text requiring that anyone "having in any county in the state (other than in any city, city and county, or town therein) appropriated waters for sale" to provide water to inhabitants.[212] The California Supreme Court, even at a time when punctuation was not understood to be part of statutes, recognized the language to include an "exception [en]closed in parentheses."[213] Overall, these past cases and others indicate that the lower courts tend not to

[200] *Id.* (quoting U.S. SENT'G GUIDELINES MANUAL § 4B1.2(B) (U.S. SENT'G COMM'N 2021)).
[201] Though the guidelines are not a statute, the court uses normal statutory interpretation in this case, as if examining a statute.
[202] *Id.* at 1126–27.
[203] *Id.* at 1127.
[204] *Id.*
[205] *Id.* at 1141 (Matheson, J., dissenting).
[206] *Id.* at 1142 (quoting Mizrahi v. Gonzales, 492 F.3d 156, 166 (2d Cir. 2007)).
[207] *Id.* at 1127 (majority opinion).
[208] *See, e.g.*, Disabled in Action of Penn v. SE Penn. Transp. Auth., 539 F.3d 199, 212 (3d Cir. 2008); Kuhns v. Ledger, 202 F.Supp.3d 433, 437–48 (S.D.N.Y. 2016); Holmes Fin. Assocs. v. Resol. Tr. Corp., 33 F.3d 561, 566–67 (6th Cir. 1994); Cemco Invs. LLC v. United States, No. 04 C 8211, 2007 WL 951944, at *9 n.8 (N.D. Ill. Mar. 27, 2007).
[209] No. 21-CR-127, 2022 WL 134732 (E.D. Wis. Jan. 14, 2022).
[210] *Id.* at *5.
[211] 90 P. 137 (Cal. 1907).
[212] *Id.* at 139.
[213] *Id.* The language in question, passed in 1885, further supports the contention that parentheses are the exception to an otherwise punctuation-less standard in statutory drafting.

discount exempting parentheticals since they demonstrate legislative carveouts from otherwise applicable statutory texts.[214]

Finally, even after the *Chickasaw Nation* decision, lower courts divide over the weight of illustrative parentheses. Some courts have held that they bear interpretive meaning. In *United States v. Monjaras-Castanda*,[215] a defendant appealed a conviction for an "aggravated felony [which includes] an offense described in paragraph 1(A) or (2) of section 1324(a) of [the statute] (related to alien smuggling)."[216] That use of parentheses is certainly illustrative since it contextualizes and modifies the outside text. The defendant argued that the statute was ambiguous, reading the parentheses to modify "offense" rather than the specified sections in the statute.[217] In this case, the defendant *transported* aliens but did not *smuggle* them. The majority affirmed the conviction, using the parentheses "descriptively" as an "aid to identification."[218] The parenthetical generally described the sorts of offenses in the listed sections. Because the referenced sections were held not to restrict transportation crimes, the punctation had identified the defendant as a felon.[219]

The issue is that the rest of the statute tended to differentiate smuggling from transportation crimes.[220] It is at least possible that the parenthetical used this way inverted the statutory text as the *Chickasaw Nation* parentheses did. The dissent noted this conflict, writing that "if Congress had intended to include *any* crime listed in [the sections] as an aggravated felony, it simply would have said so."[221] Further, it commented that grammatical analysis did not resolve the ambiguity and therefore "the language [was] not properly weighed."[222] If *Chickasaw Nation* was applied, this illustrative parenthetical would have been disfavored, but this case took the opposite view: "[c]ourts have often construed parentheticals in statutes in this manner."[223] In the right case, an illustrative parenthetical might control the outside language.[224]

But the Supreme Court readings concerning illustrative parentheticals are powerful. In *Shalala v. Huntington Hospital*,[225] the same "(for such days)" parenthetical later disfavored in *Empire Health* was under review by the Fourth Circuit.[226] The majority opinion in that case wrote that "an oblique 'for such days' parenthetical [does not imply] that Congress was superseding its own statutory definition. [The dissent] relies on the parenthetical to drive the interpretation of the whole provision, thereby allowing the statutory tail to wag the dog."[227]

---

[214] *See also* Lewis v. Hitt, 370 So.2d 1369, 1370 (Ala. 1979); United States v. Monjaras-Castaneda, 190 F.3d. 326, 330 (5th Cir. 1999); *c.f.* Pac. Ins. Co. v. Am. Nat'l Fire Ins. Co., 148 F.3d 396, 406 (4th Cir. 1998) (affirming an exemption parenthetical in construing an insurance policy).
[215] 190 F.3d. at 326.
[216] *Id.* at 328 (quoting 8 U.S.C. § 1324(a)(1)(A) (2018)).
[217] *Id.* at 328–29.
[218] *Id.* at 330.
[219] *Id.*
[220] *Compare* 8 U.S.C. § 1324(a)(1)(B)(i) (2018) *with* 8 U.S.C. § 1324(a)(1)(B)(ii) (2018); 8 U.S.C. § 1227 (a)(1)(E)(i) (2018).
[221] 190 F.3d at 332 (Politz, J., dissenting).
[222] *Id.*
[223] *Id.* at 330 (majority opinion).
[224] *See also* Sweatt v. Foreclosure Co., 212 Cal.Rptr. 350, 351–52 (Cal. Ct. App. 1985); *c.f.* Stifel, Nicolaus, & Co. v. Shift Techs., No. 21 Civ. 4135 (NRB), 2022 WL 3648145, at *4–5 (S.D.N.Y. Aug. 23, 2022) (reading "illustrative" parentheses to control the construction of a contract).
[225] Cabell Huntington Hosp., Inc. v. Shalala, 101 F.3d 984 (4th Cir. 1996).
[226] *Id.* at 988 (quoting 42 U.S.C. § 1395ww(d)(5)(f)(vi)(I) (2018)); *see supra* note 165.
[227] *Id.* at 990.

In *Chipperfield v. Missouri Air Conservation Commission*,[228] at issue was a regulation requiring an analysis that computes "an emission limitation (including a visible emission limit) based on the maximum degree of reduction for each pollutant which would be emitted.''[229] The word "including" shows that this use of parentheses mirrors those in *Chickasaw Nation*. One party interpreted the parenthetical to mean that a visible emission limit must be found for all cases involving a pollutant, while the other said that it would be necessary only sometimes.[230] The Missouri Appellate Court's treatment also mirrored that case. It took the step of combining the *Chickasaw Nation* surplusage approach with the Garner approach. The court began by saying that "the meaning of the words within the parentheses should be considered as incidental explanatory matter which is not a part of, or at least is not essential to, the main statement."[231] This conclusion was reached by first noting that the parenthesis separates textual matter, and then following Garner and his inferential step. The use of "incidental[] and helpful[]" marks could not conjure a condition that would lead to the "absurd result of requiring a visible emission limit for an invisible pollutant."[232] Thus, the parenthetical there was not held to control the text.[233]

* * * * *

In practice, courts steer away from giving operative meaning to parenthetical statements. The Supreme Court initially threw out illustrative parentheses in *Chickasaw Nation* and questioned their substantivity in recent cases. Lower courts, meanwhile, have no standardized method. At that level, it is at least clear that some grammatical uses have higher survival rates than others.

IV. A PROPOSAL ABOUT PARENTHESES

The current lay of the land regarding the statutory parenthesis is confusing and often contradictory. Courts would be correct to limit the application of certain purpose-defying parentheses, but wrong to adopt an overbroad view. This Part provides a solution via a proposed canon of construction.

A. THE NEED FOR A CANON OF CONSTRUCTION

Canons of construction are neutral "rules of thumb" often used by judges to determine legislative intent using the text of the statute.[234] While they have existed for hundreds of years,[235]

---

[228] 229 S.W.3d. 226 (Mo. Ct. App. 2007).
[229] *Id.* at 251 (quoting 10 CSR 10–6.020(2)(B)5). Regulations are interpreted with normal tools of statutory interpretation. *See id.* at 251–52.
[230] *Id.* at 251.
[231] *Id.* at 252.
[232] *Id.*
[233] *C.f., e.g.*, United States v. Bank of Am. Corp., 753 F.3d 1335, 1338 (D.C. Cir. 2014) (similarly interpreting a claim release); Knox v. Krueger, 145 N.W.2d. 904, 908 (N.D. 1996) (interpreting a judgment); Boston Helicopter Charter, Inc. v. Agusta Aviation Corp., 767 F. Supp. 363, 370–71 (D. Mass. 1991) (interpreting a contract).
[234] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2465 n.285 (2003); *see also* Nina A. Mendelson, *Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Us in the Roberts Court's First Decade*, 117 MICH. L. REV. 71, 79 (2018).
[235] Bradford C. Mank, *Textualism's Selective Canons of Construction: Reinvigorating Individual Liberties, Legislative Authority, and Deference to Executive Agencies*, 86 KY L. REV. 527, 542 (1998).

they are especially popular in today's textualist era because "they approximate Congress' drafting practices and likely preferences" for statutes, and are linked directly to the words on the page.[236] For similar reasons, the prevailing canons tend to be "syntactic," rather than "substantive," meaning they contain "grammatical and punctuation rules . . . by reference to what ordinary English speakers mean when they use or read particular words and sentences."[237] As such, these syntactic canons "pose no challenge to the principle of legislative supremacy because their very purpose is to decipher the legislature's intent."[238] Among these canons are the last antecedent, *inclusio unius*, and punctuation canons.[239] Such canons are brought to bear when two readings of a legal text are possible, for "the canons are the vocabulary of statutory interpretation."[240] While some may question the viability or the correct usage of these canons, such debates are beyond the point of this Note, and it is simply enough that they continue to be prevalent today.

Just as some canons can fall out of favor, others may be created by the Courts. Possibly since it has become so ingrained into the fabric of modern textualism, the punctuation canon has fallen out of explicit use.[241] However, other canons have been "invented" fairly recently,[242] or older canons have been "modified" to fit modern understandings.[243] Professor Nina Mendelson found that new additions "had to take a rule-like form—to be articulated as an interpretive principle applicable across a range of statutory settings—and had to have been applied repeatedly."[244] Longtime practice or tradition is also a necessary element of the equation because some legal or historical foundation is needed to stop courts from arbitrarily creating statutes.[245] Applying the original understanding of a grammatical rule or punctuation mark might serve to satisfy this element in new syntactical canons.

The ongoing mess concerning the statutory parenthetical calls for a new canon of construction. Although the last antecedent rule has been applied to uncover which words a parenthetical has modified,[246] it is not enough to provide a useful range of guidance. It is the role of the parenthesis itself that provides courts the confusion; whether treating them as less important would upset congressional intent. Such questions have been litigated repeatedly in state and federal court, and they are not going away given the number of parentheses in federal and state law. Chief Justice Roberts has even said that the Supreme Court has faced an "unfortunately large number of cases where we do this type of parsing."[247] Resting on the safe assumption that the punctuation canon is implicitly used in current statutory interpretation cases, it would help to have

---

[236] Mendelson, *supra* note 234, at 75; *see also, e.g.*, Eskridge, *supra* note 73, at 625; Mank, *supra* note 235, at 549.
[237] Mendelson, *supra* note 234, at 80; *see also* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2159 (2016).
[238] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 117 (2010).
[239] *See id.*; Mendelson, *supra* note 234, at 80; Valerie C. Brannon, CONG. RSCH. SERV., STATUTORY INTERPRETATION: THEORIES, TOOLS, AND TRENDS 29–31 (2022).
[240] *See* WILLIAM N. ESKRIDGE, JR., INTERPRETING THE LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 21 (2016) (emphasis omitted).
[241] *See* Mendelson, *supra* note 234 at 101–02. The punctuation canon tells courts that "punctuation is a permissible indicator of meaning." SCALIA & GARNER, *supra* note 75 at 161.
[242] Abbe R. Gluck, *The Federal Common Law of Statutory Interpretation*, 54 WM. & MARY L. REV. 753, 765 (2013).
[243] Mendelson, *supra* note 234, at 111.
[244] *Id.*
[245] *C.f.* Barrett, *supra* note 238, at 128– 54 (tracking historical underpinnings of substantive canons).
[246] *See* Boston Helicopter Charter, Inc. v. Agusta Aviation Corp., 767 F. Supp. 363, 370–71 (D. Mass. 1991)
[247] Transcript of Oral Argument at 27–28, Boechler v. Comm'r, 142 S. Ct. 1493 (Jan. 12, 2022) (No. 20-1472).

an agreed-upon usage of parentheses. That way, courts would no longer need to inquire as to their significance while parsing such language.[248]

Two arguments against a new canon must be addressed. First, one could argue that a canon is not necessary since other, more fundamental, canons could already do the heavy lifting in parenthetical interpretation. This argument has merit. There are, after all, other syntactic or contextual canons that diminish the need for a new one. For instance, it might be that the *ejusdem generis* canon[249] or the harmonious-reading canon[250] might signal the discounting of contrary words in an "including" illustrative parenthetical. And the Interpretive-Direction canon could be used to convince courts to follow parenthetical definitions.[251] The issue is that these canons were not invoked in the applicable cases, and they might not always achieve the correct result even if they were. There could be cases where an item in a parenthetical list could include something of a general class but that nonetheless contradicts the meaning of the text, defeating the applicability of *ejusdem generis*. Further, the mood of current judges is to inquire about the punctuation marks rather than the context of the words around them. Those marks are more closely linked with the passed text than contextual relationships and should therefore be standardized with a new canon.

One could also argue that the Court has already implicitly made a canon that would discount parenthetical information when it conflicts with outside text. After all, in three cases over the past couple of years, the Garner definition of parentheses—that they indicate unimportant phrases—has been cited favorably in the Supreme Court.[252] There are three things wrong with this view as a canon. First, this line of cases is disrupted by *Biden v. Texas*, in which the Court explicitly relied on parentheses.[253] For a canon to be born, it must be similarly "applied repeatedly" across cases, and the *Biden v. Texas* departure violates that principle. Second, it does not account for the various uses of parentheses and would apply negative treatment across the board. Such lack of nuance could circumvent congressional intent, especially in cases like *Biden v. Texas* that involve expressly carved-out exceptions. Third, it is debatable whether the Garner definition is even correct. Parentheses can and do change the meaning and context of sentences and statutes.[254] Lower courts have noted this across cases, and have applied them differently to reflect this.[255]

It would be wrong to jettison the lower courts' findings and an ongoing grammatical and legal debate for a narrow, brutish understanding; if parentheses cannot impart important parts of a law, why does Congress use them at all? A well-reasoned canon of construction would instead recognize the weaknesses and strengths of statutory parentheses in light of their history and grammatical context. The next Section proposes such a canon.

---

[248] *See* Transcript of Oral Argument at 106, Sackett v. EPA (Oct. 3, 2022) (No. 21-454); Transcript of Oral Argument at 13, 27–31, 53–54, Boechler v. Comm'r, 142 S. Ct. 1493 (Jan. 12, 2022) (No. 20-1472); Transcript of Oral Argument at 56, Becerra v. Empire Health Found., 142 S. Ct. 2354 (Nov. 29, 2021) (No. 20-1312).

[249] *See* SCALIA & GARNER, *supra* note 75, at 199 (The *esjusdem generis* canon means that a "general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned.").

[250] *See id.* at 180 ("The provisions of a text should be interpreted in a way that renders them compatible, not contradictory."). This may also be used to discount a confusing or contrarian illustrative parenthetical.

[251] *See id.* at 225 ("Definition sections and the interpretation clauses are to be carefully followed.").

[252] *See* Boechler v. Commissioner, 142 S. Ct. 1493, 1497 (2022); Reply Brief for Petitioner at 7, Sackett v. EPA, No. 21-454 (Sup. Ct. July 8, 2022); Becerra v. Empire Health Found., 142 S. Ct. 2354, 2365 (2022).

[253] *See supra* notes 176–77 and accompanying text.

[254] *See supra* part IIA.

[255] *See supra* part IIIB.

B. THE PROPOSED PARENTHESIS CANON

Courts should adopt the following as a new syntactic canon of construction: "a statement in parentheses should be discounted when it conflicts with the rest of the text, but an exception or definition in parentheses should not." This "rule-like form"[256] meets the test for becoming an accepted canon as it makes sense legally, grammatically, and historically. This final Section delves into three reasons why.

First, the legal history of parentheses and punctuation is inverted in a way that justifies a dedicated canon of construction. Parentheses aided legislators from the very start in a way its sister marks did not. Statutory drafting necessarily required breaks in sentences, especially during a time when commas and semicolons were rarely used. The parenthesis was, however, commonly used to mark those breaks, even in the 14th century.[257] Moreover, those early punctuations indicating sentence breaks were invoked in the *Casement* case as a matter of statutory interpretation.[258] Parentheses remained in use by legislators in the American colonies and the first Congress,[259] and should therefore be acknowledged as valuable interpretive asset.

Though each of the uses of the parenthesis—definitional, exemptive, and illustrative—were used in those past eras, certain uses had clearer intentions than others. For instance, in one old British statute, a parenthetical read that a person would be tried by the "[English and Scottish] Parliaments (they judging against the persons subject to theire owne authority)" in certain cases.[260] When compared against two-word exemptions seen in other statutes,[261] and perhaps ornamental parentheticals in others,[262] it becomes apparent that some uses have always been cleaner. Similarly, the constitutional wording, "(Sundays excepted),"[263] demonstrates a clear intention that Sundays are not included in counting the days a President has to consider a bill.[264] The Drafters clearly knew what they were doing in setting exceptions, and those clear intentions are neither extraneous nor unimportant.[265] In fact, the interior matter could determine what is a law and what is not. Later on, the idea of using punctuation to decide cases was shunned, but this canon of construction favoring the differentiation of uses based on clarity has early historical strength.

As the favorability of punctuation increased, the favorability of parentheses rightly decreased. If a detached phrase contradicts its parent sentence, there are reasons to discard it. Due to such ambiguous parentheticals, legal guides across the country warned against any usage.[266]

---

[256] Mendelson, *supra* note 234, at 111.
[257] *See, e.g.*, *supra* notes 34–35.
[258] MELLINKOFF, *supra* note 17, at 168 (quoting R v. Casement (1917), 86 L.J.K.B. 482, 486 (C.A. 1916) (mentioning parentheses by name). Also note that in Britain, brackets and parentheses are the same thing. *See* Neha Srivastava Karve, *Brackets and Parentheses: British vs. American*, EDITOR'S MANUAL (Nov. 6, 2022), https://editorsmanual.com/articles/brackets-british-vs-american/.
[259] *See supra* notes 122–26.
[260] An Act for the Pacification between England and Scotland 1640, 16 Car. C. 17 §1 (Eng.).
[261] *See* An Act to Settle the Trade to Africa 1697, 9 Will. 3, c. 26 § 7 (Eng.).
[262] An Act Declareing the Rights and Liberties of the Subject and Setleing the Succession of the Crowne 1688, 1 W. & M. c. 2 § 1 (Eng.) ("the Prince of Orange "whome it hath pleased Almighty God to make the glorious Instrument of Delivering this Kingdome from Popery and Arbitrary Power) . . . ."
[263] U.S. CONST. art. I, sec. 7.
[264] *See id.* For similar constitutional language, see also *id.* ("Every Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary *(except on a question of Adjournment)* shall be presented to the President . . . .") (emphasis added).
[265] *See* Becerra v. Empire Health Found., 142 S. Ct. 2354, 2369 (2022) (Kavanaugh, J., dissenting); Kesavan & Paulsen, *supra* note 43, at 337.
[266] *See supra* notes 138–144.

The proposed canon takes both the good and bad history into account. It recognizes that ambiguity is the greatest danger in interpretation by setting a presumption against parentheses. Yet it also respects that different uses are less ambiguous and avoids the overbroad view seducing the law. Under this canon, the hardest part of interpreting a problematic parenthetical would be determining what use the parentheses at issue serve.

Second, the proposed canon can be synthesized by examining past caselaw. It is thereby seen that it has been "applied repeatedly" by the courts "across a range of statutory settings."[267] The presumption against parentheses comes from previous Supreme Court directives and the benefits of legal certainty. The most influential case concerning parentheses is *Chickasaw Nation*, and that case also controls many interpretations under the proposed canon. As in that case, the canon accepts many parentheticals should be disfavored because they "cannot be used to overcome the operative terms of a statute."[268] This is especially true concerning illustrative uses like those in *Chickasaw Nation*, for such parentheses are only there to give courts an understanding of how outside text might apply or be implemented; if the inside text is confusing or risks the purpose of the provision, then it makes sense to discard it since it serves the outside text.[269] While *Boechler* and *Empire Health* did not feature the same kind of illustrative parentheses, they followed the same rule as the majority in *Chickasaw Nation* and disfavored the marks.

Empire Health interpreted the illustrative parenthetical in question as a poor indication that congress sought to drastically morph the meaning and value of a complex Medicare scheme.[270] This decision makes sense logically and keeps in line with the proposed canon and lower court decisions. In fact, it mirrors the view of the Fourth Circuit in interpreting the same statute in a different case. Just as the Court found it unlikely that the illustration would change the meaning through an "opaque mechanism,"[271] the circuit court refused to "allow[] the statutory tail to wag the dog."[272] It is true that some courts, like the Fifth Circuit in *United States v. Monjaras-Castanda*, have interpreted illustrative parentheses the other way. But these cases are the outliers, especially after the new guidance from Supreme Court in *Empire Health* and *Boechler*. Thus, the proposed canon respects the Supreme Court's recent decisions, stabilizing them into a presumption against most parentheticals.

There is a distinction, however, that is important to note in drawing the new canon. *Empire Health* left the perception of parentheses open,[273] while *Boechler* adopted the overbroad view characterizing the parenthesis as "used to convey an 'aside' or 'after thought.'"[274] The *Boechler* case indiscriminately targets the parenthesis. It is that view the proposed canon battles. Attorneys and courts must not prevail on an argument that statutory language should be dropped by virtue of its unfortunate placement in a parenthetical.

The proposed canon exempts definitional and exemptive parentheses from the above presumption to add the nuance *Boechler* misses. This move is also backed by caselaw. On the Supreme Court level, *Biden v. Texas* incorporates the idea that exceptions in parentheticals deserve

---

[267] Mendelson, *supra* note 234, at 111.
[268] Chickasaw Nation v. United States, 534 U.S. 84, 95 (2001) (quoting Cabell Huntington Hosp., Inc. v. Shalala, 101 F.3d 984, 990 (4th Cir. 1996)).
[269] *See* SCALIA & GARNER, *supra* note 75, at 63–65.
[270] *See* Becerra v. Empire Health Found., 142 S. Ct. 2354, 2365 (2022).
[271] *Id.*
[272] Cabell Huntington Hosp., Inc. v. Shalala, 101 F.3d 984, 990 (4th Cir. 1996).
[273] *Compare* 142 U.S. at 2365 *with* 142 U.S. at 2369 (Kavanaugh, J., dissenting).
[274] Boechler v. Commissioner, 142 S. Ct. 1493, 1498 (2022) (quoting BRYAN A. GARNER, GARNER'S MODERN ENGLISH USAGE: THE AUTHORITY ON GRAMMAR, USAGE, AND STYLE 1020 (2016)).

protection. Though it was an ambiguous statement warranting its own dissent,[275] the parenthetical was held to exempt the Supreme Court from a prohibition of jurisdiction.[276] In similar cases interpreting an exemption parenthetical, lower courts favored the *Biden v. Texas* majority. They used the parentheses to chart the interpretation. Courts including the Tenth Circuit,[277] the California Supreme Court,[278] and the Eastern District of Wisconsin[279] have all recognized parenthetical supremacy against the rest of the text when faced with an exempting parenthetical. Indicator words signaled to the court that the inside words were specifically considered by the drafter, and were therefore given deference. The proposed canon does the same, preserving these decisions along with the others.

Definitional canons are the second class of protected parentheses but are under relatively less dire threats than exempting parentheses. Cases like *United States v. Coscia* contribute to the structural integrity of the canon since they explicitly concern parenthetical definitions.[280] However, this inclusion should go without saying, since Courts recognize that definitions in statutes play a large role in their interpretation,[281] and Congress often places those definitions within parentheses.[282] The proposed canon therefore synthesizes recent Supreme Court cases doubting parentheses with other cases identifying their particular uses. If adopted, recent cases would not be harmed,[283] and the current trends may continue.

Third, the proposed canon fits neatly into existing notions concerning canons of construction. The proposed canon fully falls into the "syntactic" classification of canons since it simply tries to determine the right way to read a text, using basic rules of the English language. It operates either as a subset of the punctuation canon, like the rules concerning the serial comma,[284] or as its own independent canon. Since the punctuation canon has gone out of use due to its obviousness, however, and since the proposed canon strikes slightly against regular grammar,[285] the clear option would be to give the parenthesis its own canon. And, like any other syntactic canon, it may be eroded or bested by its brothers and sisters. [286] No canon is absolute, but they are useful in arguing for one interpretation over another.

A "rule against parentheses"[287] is desirable as a canon of construction, so long as certain grammatical and legal realities are observed. Illustrative parentheticals can often be confusing and disconnected from legislative intent, but they should not drag exemptive and definitional parentheticals down with them. The proposed canon has been implicitly followed by the American

---

[275] Biden v. Texas, 142 S. Ct. 2528, 2562 (2022) (Barrett, J., dissenting).
[276] *See supra* notes 174–78 and accompanying text.
[277] United States v. Thomas, 939 F.3d 1121, 1123–27 (10th Cir. 2019).
[278] Fellows v. City of Los Angeles, 90 P. 137, 139 (Cal. 1907).
[279] United states v. Krahenbuhl, No. 21-CR-127, 2022 WL 134732, at *5 (E.D. Wis. Jan. 14, 2022).
[280] United States v. Coscia, 866 F.3d 782, 791 (7th Cir. 2017).
[281] *See* SCALIA & GARNER, *supra* note 75, at 225.
[282] *See supra* note 108.
[283] The dicta in *Boechler* regarding the use of parentheses would, however, need revisitation.
[284] *See* SCALIA & GARNER, *supra* note 75, at 165–66.
[285] A strictly grammatical understanding would not place a presumption against illustrative parentheses. After all, parentheses are often used to illustrate. *See supra* note 109. The canon would invoke a more legal connotation
[286] *See, e.g.*, *id.* at 59, 63, 66, 134, 170, 234 (describing the principle of interrelated canons, presumption against ineffectiveness, presumption of validity, unintelligibility canon, presumption of consistent usage, and the absurdity doctrine). Each of these interpretive considerations can counteract the proposed parenthesis canon in the right statute and case.
[287] *See* COOK, *supra* note 138, at 32.

court system, has a legal and historical foundation, and is stated as a generally applicable rule. It should be formally adopted.

CONCLUSION

For want of a parenthesis canon, we have this Note. Parentheses are becoming a sudden concern in statutory interpretation jurisprudence. It is a valuable addition to the discussion: its history of statutory usage differs from that of other punctuation marks and its relationship in the legal community is similarly complex. Though the parenthesis has been used and interpreted for hundreds of years, it is falling out of favor. A veneer of ambiguity matched with an incorrect grammatical assumption entices lawyers to take the easy way out and discount any parenthetical out of hand.

This view is mostly wrong. It correctly points out that some provisions contradict the rest of the statute and should be disfavored. Yet it does not consider the varied uses of parentheses and the different meanings those uses might impart. Courts have questioned and differed on whether legislative intent can be imparted through this mechanism, and a new canon of construction is therefore required to steady the ship. It should be declared that a statement in parentheses should be discounted when it conflicts with the rest of the text, but an exception or definition in parentheses should not be discounted.

This new canon best synthesizes modern law and accounts for the parenthesis' legal history and current usage. As the debate and litigation regarding parentheses move forward, courts that adopt this canon may continue their trend of disfavoring statutory parentheses (except in certain circumstances).

Applicant Details

First Name	**Ashley**
Last Name	**Grabowski**
Citizenship Status	**U. S. Citizen**
Email Address	**ashleycgrabowski@gmail.com**
Address	**Address** Street **101 West Beach Place, Apartment 2809** City **Tampa** State/Territory **Florida** Zip **33606** Country **United States**
Contact Phone Number	**8503058457**

Applicant Education

BA/BS From	**University of Florida**
Date of BA/BS	**December 2018**
JD/LLB From	**University of Florida Fredric G. Levin College of Law** **https://www.law.ufl.edu/careers**
Date of JD/LLB	**May 15, 2023**
Class Rank	**25%**
Law Review/Journal	**Yes**
Journal(s)	**Journal of Law and Public Policy**
Moot Court Experience	**Yes**
Moot Court Name(s)	**The Florida Moot Court Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Hamilton, William
hamiltonw@law.ufl.edu
480-993-8777
McAlister, Merritt
mcalister@law.ufl.edu
4048617619
Mills, Jon
jon@jonlmills.com
3525380380

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Ashley Grabowski
101 W. Beach Place, Apt. 2809, Tampa, FL 33606 • (850) 305-8457 • ashleycgrabowski@gmail.com

June 13, 2023

The Honorable T. Kent Wetherell II
United States District Court for the Northern District of Florida
One North Palafox Street
Pensacola, Florida 32502

Dear Judge Wetherell:

I enjoyed interviewing with you last summer for a clerkship in your chambers. I write again to apply for your vacancies beginning in August 2024; I am interested in both the one-year and two-year positions. I recently graduated from the University of Florida Levin College of Law, where I served as an Articles Editor of the *Journal of Law and Public Policy* and Internal Vice President of The Florida Moot Court Team. In October 2023, I will begin my legal career as a Litigation Associate at Foley & Lardner in Tampa. I believe that the experience I gain practicing, along with the experience I have gained in law school, will prepare me well for a clerkship in your chambers.

I grew up in a military family, but I have spent my life in Florida: I was raised in Crestview and came to the University of Florida for my postsecondary studies. My parents began their careers by enlisting in the United States Air Force. My father retired from enlisted service after twenty years. Now, he continues to work on an Air Force base as a civil service employee. My mother became very ill when I was young and was in and out of hospitals throughout my childhood; she was eventually deemed permanently and totally disabled by the Department of Veterans Affairs. Though I am the first in my family to enter the legal field, my parents instilled ideals that I will carry throughout my career. They taught me the importance of a strong moral compass, hard work, and reliability.

My interest in clerking began the summer after my first year of law school when I worked as a Judicial Intern for the Honorable Philip R. Lammens of the Middle District of Florida. Participating in the justice system from this perspective made me a better researcher, writer, and advocate, and ever since, I have been eager to return to a courtroom. My experiences interning with the Criminal Division of the Eighth Judicial Circuit of Florida and completing a compressed course with the Honorable Paul C. Huck of the Southern District of Florida further strengthened this interest.

I have also developed my research, writing, and interpersonal skills through extracurricular activities. In my second year of law school, I scored among the top four applicants to The Florida Moot Court Team and qualified for our annual Final Four Competition, which involved presenting an oral argument before a panel of judges from the Florida Supreme Court. In this competition, I was awarded Best Oralist. In the same year, I wrote a student note that was selected for publication in a print issue of the *Journal of Law and Public Policy* while conducting research for two professors. This year, I was selected to serve as a Teaching Assistant for Trial Practice, mentor first-generation college students as a GatorLaw Mentor, and compete in additional moot court competitions. In February, I argued before a panel of federal judges in the Raymer F. Maguire Competition, and I was again awarded Best Oralist. Throughout law school, I have also worked part time in the University of Florida's residence halls.

Enclosed please find my resume, writing sample, and unofficial transcript. My letters of recommendation will be uploaded separately by my law school. Additionally, Judge Lammens has offered to be a reference for me. He can be reached at (352) 369-4869 or philip_lammens@flmd.uscourts.gov. If any other information would be helpful to you, please let me know. Thank you for your time and consideration.

Respectfully,
Ashley C. Grabowski
Ashley Grabowski

Ashley Grabowski

101 W. Beach Place, Apt. 2809, Tampa, FL 33606 • (850) 305-8457 • ashleycgrabowski@gmail.com

EDUCATION

University of Florida Levin College of Law, Gainesville, FL
Juris Doctor, *cum laude*, received May 2023
GPA: 3.58 (Top 25%)
Honors: CALI Excellence for the Future Awards (highest grade): Trial Practice, Workplace Law
The Order of Barristers
Best Oralist, Raymer F. Maguire Appellate Advocacy Competition
Best Oralist, Final Four Appellate Advocacy Competition
Semifinalist, National Online Moot Court Competition
Excellence in Pro Bono Service Award
Governor's Scholarship (full tuition, merit-based)
Publication: Note, *The Fight for Felon Re-Enfranchisement: Rethinking the Eleventh Circuit's Approach to Senate Bill 7066*, ___ U. FLA. J.L. & PUB. POL'Y (forthcoming)
Activities: *Journal of Law and Public Policy*, Articles Editor
The Florida Moot Court Team, Internal Vice President
The Honorable Paul C. Huck's Basic Civil Litigation Workshop
Trial Practice Teaching Assistant
Levin College of Law Ambassador
Guardian Ad Litem Volunteer

University of Florida, Gainesville, FL
Master of Arts in Mass Communication, received May 2020
Bachelor of Arts in English and Bachelor of Science in Advertising, *cum laude*, received December 2018
Honors: University of Florida Honors Program
Activities: University of Florida Student Government, Senate Minority Leader and Party President

EXPERIENCE

Foley & Lardner LLP, Tampa, FL
Litigation Associate Beginning October 2023

University of Florida Levin College of Law, Gainesville, FL
Research Assistant to Dean Emeritus Jon Mills May 2021 - Present
Assisting with an article on privacy and the COVID-19 pandemic; a book proposal on privacy and the Internet; and coordination of UF Law's Technology, Media, and Privacy Law Conference.

University of Florida Department of Housing and Residence Life, Gainesville, FL
Graduate Assistant July 2019 - May 2023
Directly supervised undergraduate RAs and participated in an on-call rotation for crisis response.

Eighth Judicial Circuit of Florida, Gainesville, FL
Criminal Division Intern August 2022 - November 2022
Reviewed motions for post-conviction relief, researched case law, and drafted orders.

Foley & Lardner LLP, Tampa, FL
Summer Associate, Litigation Practice Group May 2022 - July 2022
Researched topics ranging from Florida HOA statutes to procedure governing international depositions, assisted with an article on updated EEOC guidelines, and attended courtroom proceedings.

University of Florida Levin College of Law, Gainesville, FL
Research Assistant to Professor William Hamilton January 2022 - April 2022
Aided panelists at UF Law's E-Discovery Conference with the development of their presentations.

Honorable Philip R. Lammens, United States District Court, Middle District of Florida, Ocala, FL
Judicial Intern May 2021 - August 2021
Wrote memoranda of law, drafted reports and recommendations, and attended courtroom proceedings.

INTERESTS

Kayaking, poetry, and the pursuit of good coffee.

Unofficial Transcript

Personal Info

Ashley C Grabowski

Basis of Admission
Beginning Freshman

Residency Status
Florida Resident/Tuition (F)

Law Record

Programs Pursued

The Fredric G. Levin College of Law
Major - Law
Juris Doctor
Program GPA - 3.58

Your transcript reflects your total hours. To see how many hours apply to your degree, please review your degree audit.

UF Cumulative Law GPA 3.58	Total hours 90.00
UF Cumulative Grade Points 272.40	UF Cumulative Hours Earned 90.00
UF Cumulative Hours Carried 76.00	Transfer Hours 0.00

Coursework

Fall 2020

University of Florida

College
The Fredric G. Levin College of Law
Level
Professional Year 1

Term GPA	Hours Carried	Hours Earned	Grade Points Earned
3.57	15.00	17.00	53.67

Course (Class)	Course Title	Grade	Credit Attempted	Credit Earned	Credit for GPA

LAW5301 (20971)	Civil Procedure	A-	4.00	4.00	4
LAW5400 (26852)	Property	B+	4.00	4.00	4
LAW5700 (15188)	Torts	A	4.00	4.00	4
LAW5755 (15190)	Intro to Lawyering	S+	2.00	2.00	--
LAW5792 (15221)	Legal Writing	B	2.00	2.00	2
LAW5803 (27922)	Legal Research	A-	1.00	1.00	1

Spring 2021

University of Florida

College
The Fredric G. Levin College of Law

Level
Professional Year 1

Term GPA	Hours Carried	Hours Earned	Grade Points Earned
3.67	14.00	14.00	51.38

Course (Class)	Course Title	Grade	Credit Attempted	Credit Earned	Credit for GPA
LAW5000 (28589)	Contracts	A-	4.00	4.00	4

LAW5100 (23153)	Criminal Law	A-	3.00	3.00	3
LAW5501 (15393)	Constitutional Law	A-	4.00	4.00	4
LAW6930 (29594)	Legal Writing II	A-	3.00	3.00	3

Fall 2021

University of Florida

College
The Fredric G. Levin College of Law

Level
Professional Year 2

Term GPA	Hours Carried	Hours Earned	Grade Points Earned
3.38	13.00	13.00	43.98

Course (Class)	Course Title	Grade	Credit Attempted	Credit Earned	Credit for GPA
LAW6063 (14758)	Corporations	B+	3.00	3.00	3
LAW6524 (27373)	Statutory Interpr	B	2.00	2.00	2
LAW6750 (23915)	Profess Responsibilty	B+	3.00	3.00	3
LAW6807 (14683)	Legal Drafting § B	B	2.00	2.00	2

LAW6825 (27367)	Electronic Discovery	A	3.00	3.00	3

Spring 2022

University of Florida

College
The Fredric G. Levin College of Law

Level
Professional Year 2

Term GPA	Hours Carried	Hours Earned	Grade Points Earned
3.56	13.00	15.00	46.35

Course (Class)	Course Title	Grade	Credit Attempted	Credit Earned	Credit for GPA
LAW6330 (14739)	Evidence	B+	4.00	4.00	4
LAW6526 (14373)	Journal Law/Public	S	1.00	1.00	--
LAW6816 (31580)	Soc Just Lawyering	A-	3.00	3.00	3
LAW6930 (14247)	Federal Courts	A-	4.00	4.00	4
LAW6936 (25799)	Race and Justice	A-	2.00	2.00	2
LAW6951 (14345)	Moot Court	S	1.00	1.00	--

Fall 2022

University of Florida

College
The Fredric G. Levin College of Law

Level
Professional Year 3

Term GPA	Hours Carried	Hours Earned	Grade Points Earned
3.69	11.00	15.00	40.68

Course (Class)	Course Title	Grade	Credit Attempted	Credit Earned	Credit for GPA
LAW6111 (18752)	Police and Police Prac	A	3.00	3.00	3
LAW6385 (22442)	Negotiation	A-	3.00	3.00	3
LAW6930 (14362)	Arbitration Law	A-	2.00	2.00	2
LAW6930 (25934)	Federal Habeas Corpus	B+	2.00	2.00	2
LAW6930 (25148)	Mindfulness & Legal Profession	A-	1.00	1.00	1
LAW6930 (25248)	Trial Practice § C	S	3.00	3.00	--
LAW6951 (14122)	Moot Court	S	1.00	1.00	--

Spring 2023

University of Florida

College
The Fredric G. Levin College of Law

Level
Professional Year 3

Term GPA	Hours Carried	Hours Earned	Grade Points Earned
3.63	10.00	16.00	36.34

Course (Class)	Course Title	Grade	Credit Attempted	Credit Earned	Credit for GPA
LAW6367 (27546)	Adv Trial Practice (S/U)	S+	1.00	1.00	--
LAW6549 (29956)	Empl Discrimination	A-	3.00	3.00	3
LAW6714 (29954)	Child/Parent/State	B+	3.00	3.00	3
LAW6930 (13889)	Basic Litigation Bootcamp	S	1.00	1.00	--
LAW6930 (20095)	Pre-Trial Practice §A	S	3.00	3.00	--
LAW6930 (23641)	Workplace Law: Skills & Draft	A	2.00	2.00	2
LAW6936 (29971)	Topics FL Constitution Law	A-	2.00	2.00	2

LAW6951 (13997)	Moot Court	S	1.00	1.00	--

Have Questions? Contact Registrar

TOP OF PAGE

June 13, 2023

The Honorable T. Wetherell, II
United States Courthouse
1 N Palafox Street, 4th Floor
Pensacola, FL 32502

Dear Judge Wetherell:

I am writing to recommend to you my student Ashley Grabowski for the position of judicial clerk during the 2023-2024 term. Simply put, Ashley is a bright star and a joy to work with.

First, I can attest to her intellectual capabilities. She was a premier student in my e-discovery class. As you many know, my e-discovery is difficult and requires numerous skills. Ashley demonstrated excellent proficiency with a wide variety of e-discovery software tools, scored exceptionally high on the quizzes during the semester, and wrote a brilliant final examination. My final examinations are very taxing. Students are presented with numerous concrete e-discovery problems that require knowledge of the rules and case law, an appreciation of how e-discovery tools can be properly deployed to solve the presented problem, and a sense of the practical issues and field complexities that require synthesis into a just and workable solutions. As I mentioned, her examination (which is blind graded) was superb. She earned one of the few “A” grades for the course.

Second, I can attest to her social and work skills. Ashley was my research assistant for a year. She performed excellent research for me, but she really excelled in helping me plan the annual e-discovery conference. Ashley attended the conference’s weekly planning committee meeting with the 10 national experts on the committee. This can be a tough environment for a law student. Ashley managed it perfect. She was appropriately deferential, but ready to speak when she had an idea to contribute. Equally impressive, when from her student perspective a not-so-great idea surfaced at the planning committee meetings, she gracefully and politely surfaced her concerns, and helped the committee move in a better direction. Ashley worked with many of the conference presentation panels putting their PowerPoint presentations together and providing research and background materials. The Planning Committee and Conference Faculty viewed her as an invaluable asset.

Please give Ashley your highest level of consideration for your judicial clerk position. I know you will enjoy meeting this special, talented young lady, and I know she would be a perfect fit for your chambers.

Sincerely yours,

William F. Hamilton
Senior Legal Skills Professor

William Hamilton - hamiltonw@law.ufl.edu - 480-993-8777

June 13, 2023

The Honorable T. Wetherell, II
United States Courthouse
1 N Palafox Street, 4th Floor
Pensacola, FL 32502

Dear Judge Wetherell:

I write with great enthusiasm to recommend Ashley Grabowski for a clerkship in your Chambers after she graduates from the University of Florida Levin College of Law in May 2023.

I joined UF Law in August 2018 after a decade in private practice in the national appellate practice at King & Spalding in Atlanta. Before that, I served as a law clerk to Justice John Paul Stevens of the U.S. Supreme Court and Judge R. Lanier Anderson III of the U.S. Court of Appeals for the Eleventh Circuit. At UF Law, I teach Federal Courts and Constitutional Law.

I have had the pleasure of teaching Ashley both Constitutional Law and Federal Courts. She earned an "A-" in each course, but that grade does not capture the depth and quality of Ashley's legal work. She's one of my favorites in the classroom; she's deeply engaged and attentive, and she's always eager to participate in difficult discussions. Ashley's one of the rare students where I feel like her performance in law school—as good as it is—may not fully reflect her potential.

Her performance in my Federal Courts class this past Spring was particularly noteworthy. It was a small class with approximately 30 students, which allowed for a lot of class discussion and interaction. It was also a very good class; the average GPA in the class was nearly a 3.6, which is the highest average GPA for any class I've taught at UF Law. That Ashley signed up for the course is testament to her work ethic; many second-year students are scared off from taking the class (which tends to draw many Law Review students).

Ashley more than held her own. In particular, I was impressed with her approach on one of the more difficult questions on the final exam, which asked students to explain how a law like Texas's unusual S.B. 8, which outsources the enforcement of restrictions on abortion to private citizens, takes advantage of Federal Courts doctrine to eliminate pre-enforcement review in federal court. Ashley's answer was among the most successful in the class, and it reflected her deep engagement with doctrine in a nuanced way; she wasn't just applying what we'd learned to a new fact pattern, but she was explaining how the limits of existing doctrine make access to federal court more difficult in some circumstances. That requires greater facility with the law, which Ashley's exam displayed.

I've spent time with Ashley outside of the class, too. She was a regular visitor to my office hours when she was a first-year student. She always had thoughtful questions that went well beyond basic reading comprehension (many first-year students get stumped reading some cases). And she was always exceedingly polite, thoughtful, and warm in our conversations. She has an upbeat and positive attitude, while always being serious and thoughtful about her work and the world around her. I enjoy chatting with Ashley, and I think you will equally enjoy having her as a law clerk in your Chambers. Ashley's more mature than many of her peers. She's worked on campus for many years as part of the residence life staff, and I think she's experienced a wide range of crises in that role that have matured her and given her a steadiness that I respect. That she's been able to work a part-time job while doing as well as she has in law school is especially impressive.

Although Ashley's academic performance is not quite as strong as some of the other students I'm recommending this year, I have no less confidence in her abilities and talent. Should you have any questions about her candidacy, please don't hesitate to reach out to me at 404.861.7619 or mcalister@law.ufl.edu.

Sincerely yours,

Merritt E. McAlister
Associate Professor of Law

June 13, 2023

The Honorable T. Wetherell, II
United States Courthouse
1 N Palafox Street, 4th Floor
Pensacola, FL 32502

Dear Judge Wetherell:

Ashley Grabowski has been my research assistant for two years. She is an outstanding student, as her record shows. But what sets her aside as researcher and individual is her commitment to excellence. She is smart, creative and has the determination to go beyond expected work to find legal options and theories that are not easily available. She has worked on time sensitive projects and always is on time.

Ashley is ideal for a judicial clerkship because of her thorough and creative approach to research and writing. She will seek out the right analysis when the issue is unclear. I have worked with research assistants for forty years and I can truly say that Ashley is among the very best. She works very well with others. She is also willing to challenge opinions and views. I appreciate her willingness to engage in a dialogue on differing views on an issue. That ability makes everyone working with her, including me, more effective.

I unequivocally recommend Ashley as a judicial clerk. Please contact me if I can provide more information. My cell phone is 352-538-0380.

Sincerely,

Jon L Mills

WRITING SAMPLE

Ashley Grabowski
101 W. Beach Place, Apt. 2809
Tampa, FL 33606
(850) 305-8457

This writing sample is an excerpt from a brief submitted for the American Bar Association's National Appellate Advocacy Competition. I authored the brief with a team, but I wrote and edited my section independently; the attached work is entirely my own. The questions presented for the competition were:

I. Whether the First Amendment limits a public community college's power to discipline an instructor for in-class speech on a matter of public concern or whether such speech is excluded from First Amendment protection as official duty speech under *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

II. Whether the First Amendment's prohibition against compelled speech limits a public community college's power to require an instructor to communicate information—in a syllabus and through in-class instruction—endorsing a viewpoint that conflicts with the instructor's academic views.

My section of the brief addressed the first issue. My team represented the petitioner, Jonah Smith. Smith was a public college professor who was terminated after conducting a classroom discussion about a controversial current event. Smith alleged that his termination was the result of unlawful retaliation in violation of his First Amendment rights. The public college moved to dismiss his retaliation claim, arguing that his claim was barred by the Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

I. *Garcetti* does not bar Petitioner's First Amendment retaliation claim.

A college or university professor's classroom speech is not excluded from the protection of the First Amendment as "official duty" speech under the Supreme Court's decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). *Garcetti* undeniably limited the scope of First Amendment protection for public employees in many cases, but college professors do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2411 (2022).

"[T]he First Amendment prohibits government officials from retaliating against individuals for engaging in protected speech." *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1949 (2018) (citing *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998)). Generally, a plaintiff can establish a First Amendment retaliation claim by demonstrating that: (1) his speech or conduct was protected by the First Amendment; (2) the defendant took an adverse action against him; and (3) there was a causal connection between this adverse action and the protected speech. *Cox v. Warwick Valley Cent. Sch. Dist.*, 654 F.3d 267, 272 (2d Cir. 2011).

When a First Amendment retaliation claim is raised by a public employee, special considerations arise. "[T]he State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of speech of the citizenry in general." *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). However, the Supreme Court has made clear that public employees do not relinquish all First Amendment rights by simply accepting government employment. *See Id.* (recognizing that a teacher had a First Amendment right to speak on matters of public importance despite his status as a public employee); *see also Connick v. Myers*, 461 U.S. 138, 142 (1983) ("[I]t has been

settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression.").

Before *Garcetti*, First Amendment retaliation claims brought by public employees were analyzed under the *Pickering-Connick* test. The *Pickering-Connick* test has two prongs. *Connick v. Myers*, 461 U.S. 138, 142 (1983). Its first prong asks whether the public employee spoke on a matter of public concern. *Id.* Matters of public concern are broadly construed as matters that "supply the public need for information and education with respect to the significant issues of the times." *Id.* at 164 n. 4 (Brennan, J., dissenting) (citing *Wood v. Georgia*, 370 U.S. 375, 388 (1962)). If this first prong is satisfied, the test's second prong balances the employee's right to free speech against the employer's interests. *Id.* at 142.

Garcetti, decided after *Pickering* and *Connick*, narrowed the scope of First Amendment protections for public employees, holding that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006). However, *Garcetti* recognized limits to its holding: it noted that employees who make public statements outside the course of their official duties retain some possibility of First Amendment protection, and it acknowledged that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by [the Supreme Court's] customary employee-speech jurisprudence." *Id.* at 423-25.

Respondents base their motion to dismiss on *Garcetti*, alleging that Petitioner's retaliation claim is excluded from the First Amendment as "official duty" speech. R. at 11. Respondents concede that, if *Garcetti* does not exclude Petitioner's retaliation claim from First

Amendment protection, this claim cannot be resolved on the pleadings and remand to the district court is necessary. R. at 14. Because the *Garcetti* rule does not apply to the classroom speech of a community college professor, Petitioner's speech is entitled to First Amendment protection. Petitioner therefore requests that this Court reverse the decision of the lower court and remand for further proceedings.

a. *Garcetti* implied an exception for academic freedom.

Support for the academic freedom exception is found within the *Garcetti* opinion. While the majority's discussion of academic freedom is brief, it is noteworthy:

> Justice Souter suggests today's decision may have important ramifications for academic freedom, at least as a constitutional value . . . There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this Court's customary employee-speech jurisprudence. **We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.**

Garcetti v. Ceballos, 547 U.S. 410, 425 (2006) (emphasis added).

The *Garcetti* opinion was decided by a 5-4 majority. *Id.* at 412. The most popular dissent, authored by Justice Souter, made a strong case for an academic freedom exception to the *Garcetti* rule. *Id.* at 427-44 (Souter, J., dissenting).

Justice Souter's dissent expressed concern that the *Garcetti* rule was overbroad and "spacious enough to include even the teaching of a public university professor," as teachers at public colleges and universities "necessarily speak and write 'pursuant to . . . official duties.'" *Id.* at 438. Justice Souter warned that this could "imperil First Amendment protection of academic freedom," which the Supreme Court has repeatedly associated with special constitutional value. *Id.*

The majority credited this argument with merit, going so far as to explicitly suspend academic freedom issues from the reach of the *Garcetti* opinion. *Id.* at 425 ("We need not, and for that reason do not, decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching."). At a minimum, this indicates recognition of special constitutional value associated with academic freedom, and it implies an opportunity for exclusion from the *Garcetti* rule on that basis. Read more strongly, this could suggest that at least some justices within the narrow *Garcetti* majority considered an academic freedom exception to be justified.

b. The Supreme Court has long associated academic freedom with special constitutional value.

As Justice Souter highlighted in his *Garcetti* dissent, the Supreme Court has repeatedly associated academic freedom with special constitutional value. *Garcetti v. Ceballos*, 547 U.S. 410, 438 (2006) (Souter, J., dissenting).

The Supreme Court considers academic freedom to be of constitutional significance to teachers in their individual capacities and to the public as a whole. In *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), the Supreme Court held that a governmental inquiry into the contents of an individual professor's lectures at a public university "unquestionably was an invasion of [his] liberties in the areas of academic freedom and political expression—areas in which government should be extremely reticent to tread." But the Supreme Court has clarified that academic freedom is also of constitutional significance to the general public. *See Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (noting that our nation "is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the

teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.").

In a later case, the Supreme Court wrote that it has "long recognized that, given the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." *Grutter v. Bollinger*, 539 U.S. 306, 329 (2003) (citing *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)). The *Grutter* Court cited specifically to Justice Frankfurter's concurrence in *Wieman*, which focused upon the role that teachers play in fostering public discourse:

> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. **It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion** . . . . They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and action . . . . [T]o assure which the freedoms of thought, of speech, of inquiry, of worship are guaranteed by the Constitution of the United States against infraction by national or State government.

Wieman v. Updegraff, 344 U.S. 183, 196–97 (1952) (Frankfurter, J., concurring) (emphasis added).

Indeed, decades of Supreme Court precedent correlate teachers' academic freedom within the classroom to bedrock First Amendment principles. *See Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American Schools."); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (noting that teaching and academic scholarship are "a special concern of the First Amendment"); *Grutter v. Bollinger*, 539 U.S. 306 329 (2003) (acknowledging that "expansive freedoms of speech and thought" are associated with the university environment); *Kennedy v. Bremerton Sch.*

Dist., 142 S. Ct. 2407, 2423 (2022) (noting that "our precedents remind us that the First Amendment's protections extend to teachers and students, neither of whom shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.").

c. Multiple circuits have recognized an academic freedom exception to *Garcetti*.

Several federal circuits have recognized an academic freedom exception to *Garcetti*. The construction and function of the exception varies amongst the circuits.

i. The Fourth Circuit recognized an academic freedom exception to *Garcetti*.

The Fourth Circuit recognized an academic freedom exception to *Garcetti* in *Adams v. Trustees of the University of North Carolina*, 640 F.3d 550 (4th Cir. 2011). In *Adams*, an associate professor brought a retaliation claim against a state university, alleging that it failed to promote him to the position of full professor because of disagreement with ideas he had expressed in "external writings and appearances." *Id.* at 553-56. The *Adams* defendants contended that because the plaintiff's position as an associate professor required him to engage in scholarship, research, and service to the community, the plaintiff's external writings and appearances constituted "statements made pursuant to [his] official duties" under *Garcetti*. *Id.* at 564 (citing *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006)).

The defendants' argument was essentially that the plaintiff was employed to undertake his First Amendment speech. *Id.* The Fourth Circuit took issue with this characterization. According to the court, the argument "underscore[d] the problem recognized by both the majority and the dissent in *Garcetti*, that 'implicate[d] additional constitutional interests . . . are not fully accounted for' when it comes to 'expression related to academic scholarship or classroom instruction.'" *Id.* (quoting *Garcetti v. Ceballos*, 547 U.S. 410, 425 (2006)).

The plaintiff's speech was "not tied to any more specific or direct employee duty than the general concept that professors will engage in writing, public appearances, and service within their respective fields." *Id.* The court held that this was insufficient to render it "pursuant to [the plaintiff's] official duties" as intended by *Garcetti*. *Adams v. Tr. of the Univ. of N.C.*, 640 F.3d 550, 564 (4th Cir. 2011).

Thus, the Fourth Circuit's construction of *Garcetti*'s academic freedom exception operates by narrowing the definition of "statements made pursuant to official duties" to statements that are *specifically* or *directly* related to official duties. Though this approach suited the plaintiff in *Adams*, it fails to address the concerns raised by the majority and dissent in *Garcetti*: under this approach, a professor's off-campus speech about his personal views would likely be protected, but his on-campus speech may not be. As the Supreme Court has repeatedly recognized, freedom of speech in a classroom is critical for fostering public discourse. *See Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) ("It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion."). The Fourth Circuit's approach is therefore unviable.

ii. The Fifth Circuit ruled on a First Amendment retaliation suit without applying *Garcetti*.

In *Buchanan v. Alexander*, 919 F.3d 847 (5th Cir. 2019), the Fifth Circuit ruled on a First Amendment retaliation suit without mentioning *Garcetti*. *Buchanan* involved the termination of a tenured associate professor at a state university. *Id.* at 850-52. The termination was based upon the professor's use of profanity and discussion of her own sex life and the sex life of her students in the classroom. *Id.*

The professor asserted that the termination violated her First Amendment rights to free speech and academic freedom. *Id.* In its analysis, the *Buchanan* court applied the *Pickering-Connick* test without consideration of whether the plaintiff's speech was pursuant to her official duties. *Id.* at 852-54.

There are four possible ways to read the Fifth Circuit's omission of *Garcetti*. Nick Cordova, *An Academic Freedom Exception to Government Control of Employee Speech*, 22 FEDERALIST SOC'Y REV. 284, 289 (2021). First, the omission could have been an oversight by the court. *Id.* This is, of course, unlikely. Second, the omission "could imply a holding that [the plaintiff's] classroom speech, though pursuant to official duties, nonetheless receives First Amendment protection because an academic freedom exception exists and applies to it." *Id.* Third, the omission could indicate that the Fifth Circuit adopted the Fourth Circuit's approach, narrowing the definition of "statements made pursuant to official duties" to statements that are *specifically* or *directly* related to official duties. *Id.* Fourth, the omission could indicate that the plaintiff's speech "was so far removed from her employer's purposes that it was not pursuant to her official duties even within the ordinary meaning of that term" so that *Garcetti* was never triggered at all. *Id.* Of these possible interpretations, the fourth is the most viable, as it "requires a less complicated and far less consequential implicit holding than the second and third possibilities, while avoiding the first possibility's assumption of gross negligence by the court." *Id.*

In Petitioner's case, the speech at issue is within the ordinary meaning of official duties. Petitioner's speech occurred in class and was part of the lesson that he was teaching. R. at 5-6. Thus, the Fifth Circuit's approach does not inform Petitioner's case.

iii. The Sixth Circuit recognized an academic freedom exception to *Garcetti*.

The Sixth Circuit recognized an academic freedom exception in *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021). In *Meriwether*, a professor at a public college received a written reprimand for violating a school policy requiring faculty to refer to students by pronouns that reflected their self-asserted gender identity. *Id.* at 498-503.

The professor utilized a formal method of teaching that involved addressing students as "Mr." or "Ms." to help students "view the academic experience as a serious, weighty endeavor" and "foster an atmosphere of seriousness and mutual respect." *Id.* at 499. One day, the professor accidentally referred to a student with a pronoun that did not align with their gender identity; the student approached the professor after class and asked to be addressed with pronouns that matched their gender identity. *Id.* The professor refused, stating that his sincerely held religious beliefs "prevented him from communicating messages about gender identity that he believe[d] [were] false," and that it was not realistic for him to eliminate all usage of pronouns. *Id.* The incident was reported to college administration. *Id.*

After meeting with the involved parties, college administration requested that the professor refrain from any gender-based references to avoid further conflict. *Meriwether v. Hartop*, 992 F.3d 492, 499 (6th Cir. 2021). The professor replied that this was next to impossible, especially when teaching, but he offered a compromise: he would refer to the student who approached him by just their last name, but he would continue using pronouns for all other students. *Id.* College administration accepted this compromise. *Id.*

A few weeks later, the student approached college administration and expressed that they were still dissatisfied. *Id.* College administration then informed the professor that, if he did not begin referring to the student by the pronouns they requested, he would be in violation of school

policy. *Id.* at 500. The professor again attempted to achieve compromise: he offered to use the student's preferred pronouns if he could place a disclaimer in his syllabus "noting that he was doing so under compulsion and setting forth his personal and religious beliefs about gender identity." *Id.* College administration said that this would not be appropriate and reiterated that the professor must either stop using pronouns for all students or refer to the student by the pronouns they requested. *Meriwether v. Hartop*, 992 F.3d 492, 500 (6th Cir. 2021). The professor declined and was eventually issued a written reprimand. *Id.* at 501. Following these events, the professor sued, alleging that the college violated his First Amendment right to free speech. *Id.* at 502.

The Sixth Circuit cited language from the Supreme Court's decisions in *Grutter v. Bollinger*, 539 U.S. 306 (2003), *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), and *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), to "establish that the First Amendment protects the free-speech rights of professors when they are teaching." *Meriwether v. Hartop*, 992 F.3d 492, 505 (6th Cir. 2021). Through this precedent, the court constructed an academic freedom exception that "covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not." *Id.* at 507. The Sixth Circuit differentiated a professor's in-class speech to his students from other speech by government employees by noting three critical free speech interests that are at stake in the college classroom: "(1) the students' interest in receiving informed opinion, (2) the professor's right to disseminate his own opinion, and (3) the public's interest in exposing our future leaders to different viewpoints." *Id.* This broad construction of the academic freedom exception would encompass Petitioner's speech in this case, as it occurred in a classroom and related to a matter of public concern. R. at 5-6.

iv. The Ninth Circuit recognized an academic freedom exception to *Garcetti*.

The Ninth Circuit recognized an academic freedom exception to *Garcetti* in *Demers v. Austin*, 746 F.3d 402 (9th Cir. 2014). In *Demers*, a university professor alleged that his university unlawfully retaliated against him for distributing a pamphlet and drafts for an in-progress book. *Id.* at 406-07. The professor served on a university committee that was debating some of the issues addressed by the pamphlet and book; he distributed these materials to media sources, university faculty, and others without submitting them to the committee for approval. *Id.* at 407. Afterward, the university gave the professor negative annual performance reviews, conducted two internal audits, and entered a formal notice of discipline. *Id.* The professor sued, alleging retaliation in violation of his First Amendment rights. *Id.* at 406. The university responded that the professor's speech was conducted within his official duties and that, as a result, his claim should be barred by *Garcetti*. *Id.* at 409.

The Ninth Circuit agreed that the speech at issue was pursuant to the professor's official duties, but it nevertheless concluded that the professor's retaliation claim was not barred by *Garcetti*. *Demers v. Austin*, 746 F.3d 402, 412 (9th Cir. 2014). The court explained that "*Garcetti* does not—indeed, consistent with the First Amendment, cannot—apply to teaching and academic writing that are performed 'pursuant to the official duties' of a teacher and professor." *Id.* The Ninth Circuit's academic freedom exception is therefore constructed to include a professor's oral *and* written speech. Under this approach, Petitioner's speech would be exempted from the *Garcetti* rule.

d. Recognition of an academic freedom exception to *Garcetti* is administrable and still protects important institutional interests.

Recognition of an academic freedom exception to *Garcetti* "does not give teachers carte blanche in the performance of their duties." R. at 24. Any speech that qualifies for the academic freedom exception would still undergo analysis under the two-prong *Pickering-Connick* balancing test.

The *Pickering-Connick* balancing test accounts for institutional values within its analytical framework. The first prong of the test ensures that First Amendment protection is only provided for speech that involves matters of public concern. *Connick v. Myers*, 461 U.S. 138, 142 (1983). This is restricted to matters that "supply the public need for information and education with respect to the significant issues of the times." *Id.* at 164 n. 4 (Brennan, J., dissenting) (citing *Wood v. Georgia*, 370 U.S. 375, 388 (1962)). If this first prong is satisfied, the test then balances the employee's right to free speech against the institution's interests. *Id.* at 142. If the institution's interests outweigh the employee's right to free speech, the speech will not receive First Amendment protection. *Id.* Recognition of an academic freedom exception is therefore sensible from a policy perspective.

e. This Court should recognize an academic freedom exception to *Garcetti* and should reverse and remand the lower court for further proceedings.

Justification for the academic freedom exception is rooted in *Garcetti* itself, Supreme Court precedent, federal circuit court holdings, and policy. Though circuits have constructed the academic freedom exception in varying ways, precedent indicates that in-class speech, such as the speech at issue in this case, is ideal for protection under the exception. Petitioner respectfully requests that this Court reverse the decision of the lower court and remand for further proceedings.

Applicant Details

First Name	**Eliza**
Last Name	**Morehouse**
Citizenship Status	**U. S. Citizen**
Email Address	**egm19f@fsu.edu**
Address	**Address** Street **2525 W Tennessee St., Apt 6304B** City **Tallahassee** State/Territory **Florida** Zip **32304** Country **United States**
Contact Phone Number	**(717) 658-0298**

Applicant Education

BA/BS From	**University of South Carolina-Columbia**
Date of BA/BS	**May 2021**
JD/LLB From	**The Florida State University College of Law** **http://www.law.fsu.edu**
Date of JD/LLB	**May 4, 2024**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Business Review** **Law Review**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Allman, Francis
allmanf@leoncountyfl.gov
Ryan, Erin
eryan@law.fsu.edu
_850_ 645-0072

This applicant has certified that all data entered in this profile and any application documents are true and correct.

2525 W Tennessee St, Apt 6304B
Tallahassee, FL 32304

June 20, 2023

The Honorable Judge T. Kent Wetherell II
United States District Court, Northern District of Florida
One North Palafox St.
Pensacola, FL 32502

Dear Judge Wetherell,

I am a rising third-year law student at Florida State University College of Law, graduating in May of 2024. I am writing to apply to the Clerkship position for the 2024-2025 term. Enclosed, please find my current resume, writing sample, transcripts, and letters of recommendation.

Throughout my second year of law school, I worked diligently as a Law Clerk at Florida Department of Financial Services and maintained a class rank in the top fifteen percent of my class. As well as working and taking classes, I also hold positions as a Staff Editor on both the *Florida State University Law Review* and *Florida State University Business Review*. These journal positions have sharpened my Bluebook skills, enhanced my attention to detail, and allowed me to read many articles spanning different areas of the law. Balancing all of these activities has required me to have excellent time management skills, which will be an asset in a Clerkship position. As a testament to my management abilities, I have received two Book Awards for my achievements in English Legal History and Evidence.

In the summer after my first year of law school, I externed for a Second Judicial Circuit Judge, the Honorable Judge Francis Allman. Working for Judge Allman piqued my interest in a post-graduate judicial clerkship. I deeply admire his skill and dedication, and I hope to continue to learn more about the legal process through partaking in a clerkship. Working in a clerkship capacity would provide me with the opportunity to study and apply the law under the guidance of someone with immense knowledge and experience.

Though I am not a Florida native, I intend to practice law and live in Florida after I graduate. This summer I am working at a land use and zoning law firm in Miami, and I attend law school in Tallahassee. I would be delighted to partake in a clerkship in Florida, a state I now call home.

I would be honored to serve as your judicial clerk following my graduation date. Thank you for your time and consideration.

Sincerely,

Eliza Morehouse

Eliza Morehouse
Phone: 717-658-0298 Email: egm19f@fsu.edu
2525 W Tennessee St, Apt 6304B, Tallahassee, FL 32304

EDUCATION

Florida State University College of Law — Tallahassee, FL
Juris Doctor Candidate — May 2024
GPA: 3.675
Rank: 21/150 (Top 15%)
Awards Book Award: Evidence
Activities Law Review Staff Editor
Business Review Staff Editor

University of Oxford, St. Edmund Hall — Oxford, England
Summer Program in Law — June 2022- August 2022
Awards Book Award: English Legal History

University of South Carolina — Columbia, SC
Bachelor of Arts, Art History — May 2021
Minor in English
GPA: 3.88
Honors Magna Cum Laude

University of Miami — Coral Gables, FL
GPA: 3.98 — August 2018- May 2019
Honors President's Honor Roll: Fall 2018
Provost's Honor Roll: Spring 2019

EXPERIENCE

Bercow, Radell, Fernandez, Larkin, & Tapanes PLLC — Miami, FL
Summer Associate — May 2023- August 2023

Wrote due diligence memorandums on land use and zoning regulations for particular parcels of land. Researched zoning codes and comprehensive plans. Drafted letters of intent to apply for various development applications. Assisted with community outreach for upcoming development projects.

Florida Department of Financial Services — Tallahassee, FL
Division of Workers' Compensation Law Clerk — September 2022- April 2023

Communicated with opposing counsel regarding ongoing cases. Drafted discovery requests, interoffice memorandums, and settlement agreements. Performed legal research.

Second Judicial Circuit of Florida — Tallahassee, FL
Judicial Extern for the Honorable Judge Francis Allman — May 2022- June 2022

Observed and documented jury selection, trials, sentencing hearings, juvenile hearings, and other proceedings. Researched legal issues. Wrote and edited orders.

Florida State University

Office of the Registrar
282 Champions Way
PO Box 3062480
Tallahassee, Florida 32306-2480

Name: **Eliza G Morehouse**
Preferred Name: Eliza G Morehouse
Student ID: 200651192
Birthdate: 06/25/XXXX
Residency: Florida Resident (USA)
Print Date: 6/12/2023

Unofficial Transcript

ALL CREDIT HOURS ON THIS RECORD REFLECTED IN SEMESTER HOURS
May not be released to a third party without permission

Beginning of Law Record

2021 Fall

Program: Law
Plan: Law Major

Course	Description	Grd	GB	RP	Taken	Passed	Points
LAW5300	CIVIL PROCEDURE	A-	LWG		4.000	4.000	15.000
LAW5400	PROPERTY	A	LWG		4.000	4.000	16.000
LAW5700	TORTS	A-	LWG		4.000	4.000	15.000
LAW5792	LEGAL WRTNG & RSCH I	A	LWG		2.000	2.000	8.000

			Taken	Passed	GPA Hrs	Points
Term GPA	3.857	Term Totals	14.000	14.000	14.000	54.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Term GPA	3.857	Comb Totals	14.000	14.000	14.000	54.000
Cum GPA	3.857	Cum Totals	14.000	14.000	14.000	54.000
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.857	Comb Totals	14.000	14.000	14.000	54.000

Term Honor: DEAN'S LIST

2022 Summer

Program: Law
Plan: Law Major

Course	Description	Grd	GB	RP	Taken	Passed	Points
LAW6330	EVIDENCE **Topic**: ONLINE	A-	LWG		4.000	4.000	15.000
LAW7250	COMPARATIVE LAW **Topic**: COMPARATIVE LAW	A	LWG		2.000	2.000	8.000
LAW7930	SPECIAL TOPICS **Topic**: ENGLISH LEGAL HISTORY	A	LWG		2.000	2.000	8.000
LAW7930	SPECIAL TOPICS **Topic**: EUROPEAN UNION LAW	B+	LWG		2.000	2.000	6.500
LAW7949	CLINICAL LAW PROGRAM **Topic**: 1L JUDICIAL EXTERNSHIP	S	SOU		2.000	2.000	0.000

			Taken	Passed	GPA Hrs	Points
Term GPA	3.750	Term Totals	12.000	12.000	10.000	37.500
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Term GPA	3.750	Comb Totals	12.000	12.000	10.000	37.500
Cum GPA	3.738	Cum Totals	42.000	42.000	40.000	149.500
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.738	Comb Totals	42.000	42.000	40.000	149.500

2022 Spring

Program: Law
Plan: Law Major

Course	Description	Grd	GB	RP	Taken	Passed	Points
LAW5000	CONTRACTS	A	LWG		4.000	4.000	16.000
LAW5100	CRIMINAL LAW	B+	LWG		3.000	3.000	9.750
LAW5501	CONSTITUTIONAL LAW I	B+	LWG		3.000	3.000	9.750
LAW5522	LEGISLATION AND REGULATION	A-	LWG		3.000	3.000	11.250
LAW5793	LEGAL WRITNG/RECH II	A-	LWG		3.000	3.000	11.250

			Taken	Passed	GPA Hrs	Points
Term GPA	3.625	Term Totals	16.000	16.000	16.000	58.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Term GPA	3.625	Comb Totals	16.000	16.000	16.000	58.000
Cum GPA	3.733	Cum Totals	30.000	30.000	30.000	112.000
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.733	Comb Totals	30.000	30.000	30.000	112.000

Term Honor: DEAN'S LIST

2022 Fall

Program: Law
Plan: Law Major

Course	Description	Grd	GB	RP	Taken	Passed	Points
LAW5502	CONSTITUTIONL LAW II	A-	LWG		3.000	3.000	11.010
LAW6060	CORPORATIONS	B+	LWG		4.000	4.000	13.320
LAW7930	SPECIAL TOPICS **Topic**: INTRO TO INTELLECTUAL PROPERTY	A-	LWG		3.000	3.000	11.010
LAW7950	LAW REVIEW	S	SOU		2.000	2.000	0.000

			Taken	Passed	GPA Hrs	Points
Term GPA	3.534	Term Totals	12.000	12.000	10.000	35.340
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Term GPA	3.534	Comb Totals	12.000	12.000	10.000	35.340
Cum GPA	3.697	Cum Totals	54.000	54.000	50.000	184.840
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.697	Comb Totals	54.000	54.000	50.000	184.840

Florida State University

Office of the Registrar
282 Champions Way
PO Box 3062480
Tallahassee, Florida 32306-2480

Name: **Eliza G Morehouse**
Preferred Name**:** Eliza G Morehouse
Student ID: 200651192
Birthdate: 06/25/XXXX
Residency: Florida Resident (USA)
Print Date: 6/12/2023

Unofficial Transcript

ALL CREDIT HOURS ON THIS RECORD REFLECTED IN SEMESTER HOURS
May not be released to a third party without permission

2023 Spring

Program: Law
Plan: Law Major

Program: Law Certificate
Plan: Business Law Certificate

Course	Description	Grd	GB	RP	Taken	Passed	Points
LAW6460	LAND USE REGULATION	B+	LWG		3.000	3.000	9.990
LAW7575	ENTERTAINMENT LAW	B	LWG		3.000	3.000	9.000
LAW7750	PROFSNL RESPONSIBLTY	A	LWG		3.000	3.000	12.000
LAW7930	SPECIAL TOPICS	A	LWG		3.000	3.000	12.000
	Topic: NAT RES LAW & ENVIR POL LAW						

			Taken	Passed	GPA Hrs	Points
Term GPA	3.583	Term Totals	12.000	12.000	12.000	42.990
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Term GPA	3.583	Comb Totals	12.000	12.000	12.000	42.990
Cum GPA	3.675	Cum Totals	66.000	66.000	62.000	227.830
Transfer Cum GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined Cum GPA	3.675	Comb Totals	66.000	66.000	62.000	227.830

Law Career Totals

			Taken	Passed	GPA Hrs	Points
Cum GPA:	3.675	Cum Totals	66.000	66.000	62.000	227.830
Trans Cum GPA		Trans Totals	0.000	0.000	0.000	0.000
Comb Cum GPA	3.675	Comb Totals	66.000	66.000	62.000	227.830

End of Law

End of Academic Transcript

March 27, 2023

Re: Eliza Morehouse

Dear Judge:

I am delighted to recommend Eliza Morehouse for a postgraduate judicial clerkship. Eliza served as a judicial intern in my office from May 9 to June 17, 2022. Just so you know who's making the reference, a few words about me. I have been a circuit judge for seven years. Before taking the bench, I was a career prosecutor, serving nearly 19 years as an assistant state attorney, with several of those as a supervisor. I handled thousands and thousands of cases and conducted roughly 200 felony jury trials.

During the time Eliza interned with me, I was assigned to a felony docket consisting of 600-800 cases. I quickly took note of Eliza's interest in learning everything she could about the workings of the criminal division. As her schedule permitted, she made time to attend a large variety of hearings and other proceedings. The issues involved related to bond, sentencing, a wide variety of evidentiary issues, violation of probation matters, and more. Eliza often came to my office afterward to ask questions.

However, what most impressed me was Eliza's research and writing ability. I frequently gave Eliza research assignments. She was able to locate the relevant authority, synthesize it, and provide me with useful written memoranda, all in a timely fashion. As I mentioned a moment ago, felony division judges deal with a variety of issues. Eliza was not intimidated by any assignment I gave her, and I found her work to be outstanding.

Eliza is also a delightful person. She was always cheerful, happy, and a pleasure to be around. If you want a motivated and talented judicial clerk, one with excellent research and writing ability, and one who displays a positive, can-do attitude, you will find one in Eliza Morehouse.

Please do not hesitate to contact me if further information would be helpful.

With kind regards,

Frank Allman
Circuit Judge

FJA/kp

Francis Allman - allmanf@leoncountyfl.gov

June 22, 2023

The Honorable T. Wetherell, II
United States Courthouse
1 N Palafox Street, 4th Floor
Pensacola, FL 32502

Re: Judicial Clerkship Reference for Eliza Morehouse

Dear Judge Wetherell:

Eliza Morehouse, a student of mine here at Florida State University, has asked me to write this letter in support of her application for judicial clerkships after graduation. Based on her excellent research and writing skills, laudable personal discipline, and demonstrated performance in my own classes and many others here at FSU, I am delighted to recommend her.

I first came to know Eliza in 2021 as an A-student in my 1L Property Law course, where she stood out as an especially engaged member of a large class of first year students. Eliza was always prepared and ready to discuss the issues I posed, even as other students struggled to stay focused during a stressful pandemic semester. The "A" that she received on the exam reflected her ability to grapple effectively with complex legal issues and write persuasive legal analysis. But I also remember her for her relentless hard work and positivity, even as classmates around her succumbed to the negativity of the stressful circumstances.

This year, Eliza took my Environmental Policy & Natural Resources Law Seminar, where she impressed me even more in a much more intimate classroom setting with even greater opportunities for personal interaction with me and her classmates. In a small class where students could not hide, Eliza excelled even further. She proved herself among the most disciplined best prepared students I have had all year, not to mention the most enthusiastic. She will earn the Book Award as the top scoring student in this class, both for her excellent paper about the pressing need for better international management of the Mekong River in southeast Asia, and also for her consistently excellent performance in our highly interactive classroom.

Indeed, I am not the only one who has recognized Eliza's strong performance at FSU. She currently ranks 11th out of 150 students, in the top 7%. She successfully competed to be a staff editor on the FSU Law Review, and also serves on the FSU Business Law Review. She has continued to perform at a high academic level while clerking in the General Counsel's Office at the Florida Department of Financial Services. Last summer, she further honed her skills as a judicial extern to Judge Francis Allman on the Second Judicial Circuit here in Florida. Before law school, she managed medical records and HIPAA compliance for a personal injury law firm.

Eliza is interested in clerking because she believes it is an invaluable opportunity for professional growth and the perfect way to launch a new legal career. She is also eager for the mentoring relationship that she hopes a clerkship will provide. She had a remarkable experience as a circuit court extern over her 1L summer, and she loved the many lessons she learned from her from her supervising judge about the legal process. She longs for a similar experience at the higher level that a post-graduate clerkship would provide, where she hopes to "study and apply the law under the guidance of someone with immense knowledge and experience." She is also passionate about further strengthening the legal research and writing skills that she understands will always be at the heart of her legal career.

I have encouraged Eliza to apply for clerkships because I think it would be a great experience for her, but also because I know she would be a great asset to any chambers. Eliza balances her laudable work ethic with an openness and friendliness that will make her a valued member of any team. Perhaps one of her most endearing qualities is that she does not know how good she really is. I hope you will give her the opportunity to serve you, and I would be happy to answer any other questions you may have about her.

Sincerely,

Erin Ryan

Erin Ryan - eryan@law.fsu.edu - _850_ 645-0072

Managing the Mekong: Resolving the Fishery Crisis

Table of Contents

Page

I. Introduction

The Mekong River is Southeast Asia's longest river, and provides sustenance for almost seventy million people in Southeast Asia, including China, Myanmar, Laos, Thailand, Cambodia, and Vietnam.[1] The Upper Mekong Region is comprised of China and Myanmar, while the Lower Mekong Region is comprised of Thailand, Laos, Cambodia, and Vietnam.[2] The Mekong River ends in the Mekong Delta, located in Cambodia and Vietnam.[3] The Mekong River is home to the second most diverse population of fish in the world, and is also home to the world's largest inland fishery.[4] There are over 1,100 fish species present in the Mekong River, some of which are only found there, like the Mekong giant catfish.[5] The fisheries are vital to the livelihoods of the people, as well as the overall economy of the Mekong region.[6] "Recent estimates by the Mekong River Commission put the value of the capture fishery at 11 billion US dollars per year."[7] Many fishermen are subsistence fishers, and capture fish to feed themselves and their families.[8] However, these fisheries are at risk due to a plethora of issues, such as dam

[1] Hoang Thi Ha & Farah Nadine Seth, *The Mekong River Ecosystem in Crisis: ASEAN Cannot Be a Bystander*, ISEAS Perspective 2021/69, ISEAS- Yusof Ishak Institute, https://www.iseas.edu.sg/articles-commentaries/iseas-perspective/2021-69-the-mekong-river-ecosystem-in-crisis-asean-cannot-be-a-bystander-by-hoang-thi-ha-and-farah-nadine-seth/.
[2] Lynn Phan, Note, *The Sambor Dam: How China's Breach of Customary International Law Will Affect the Future of the Mekong River Basin*, 32 GEO. ENVTL. L. REV. 105, 106 (2019).
[3] *Mekong Delta*, Delta Alliance, http://www.delta-alliance.org/deltas/mekong-delta#:~:text=In%20Vietnam%20the%20Mekong%20delta%20is%20intensively%20developed%20for%20agriculture.&text=The%20area%20is%20one%20of,lives%20in%20the%20Mekong%20Delta (last visited Apr. 17, 2023).
[4] Ian Campbell & Chris Barlow, *Hydropower Development and the Loss of Fisheries in the Mekong River Basin*, FRONTIERS IN ENVTL. SCI., 2 (2020), https://doi.org/10.3389/fenvs.2020.566509.
[5] *Id.*
[6] *Id.*
[7] *Id.* at 4.
[8] *Id.* at 1-2.

development, illegal fishing, and climate change.[9] These impacts have led to a decline in fish catch as well as fish species.[10] It is imperative to restore the Mekong fisheries to their previous vitality, as so many lives depend on it.

This paper will focus on the management and environmental issues affecting the fisheries in this region. It will analyze the status of the fish population and reasons for the fishery decline. It will consider possible solutions to this decline, while discussing governance issues and potential strategies. This paper will recommend solutions to the fishery crisis in the Mekong through collaboration with Japan to compel nonmember countries to cooperate with the Mekong River Commission, giving the Mekong River Commission more authority to ensure compliance, and comparing the value of fisheries against the value of hydropower development.

This First part gives an overview of the Mekong region. The Second part will explain the previous management regimes in the Mekong region, as well as analyzing the current regime and a rival management agreement. The Third part will analyze the current status and decline of fisheries in the Mekong, and reasons for this decline. The Fourth part considers possible resolutions to the fishery decline and discusses considerations such as governance issues and potential strategies. The Fifth part will summarize and conclude the findings of the paper.

II. Management in the Mekong

A. History of Management

Since 1957, an international water management regime has been in place in the Mekong region.[11] It is useful to understand the history of the management regimes in the Mekong region,

[9] MRC, *Status and Trends of Fish Abundance and Diversity in the Lower Mekong Basin during 2007–2018*, Vientiane: MRC Secretariat, https://doi.org/10.52107/mrc.qx5yo0.
[10] *Id.*
[11] Greg Browder & Leonard Ortolano, *The Evolution of an International Water Resources Management Regime in the Mekong River Basin*, 40 NAT. RESOURCES J. 499, 500 (2000).

as it provides a framework for the current management issues and the dynamics between the member countries of the regime. There are three periods of management of the Mekong region.[12] The first is the Mekong Committee, which lasted from 1957-1975.[13] The Mekong Committee was created and developed during the Cold War era.[14] During the Cold War conflict, the region was plagued with a rivalry between capitalism and communism.[15] North Vietnam and the communists were supported by China and the Soviet Union, while South Vietnam and the capitalists were supported by the United States.[16] Thailand also supported capitalism and opposed communism.[17] Laos was in the midst of a civil war between communists and capitalists, and Cambodia stayed relatively neutral.[18] During the 1950s, the US Bureau of Reclamation and the United Nations' Economic Commission for Asia and the Far East went to the Mekong region to survey the area for potential hydropower development.[19] Due to the clash between communism and capitalism, the United States and other capitalist governments wanted a development plan to bond the capitalist groups present in the region together, and therefore prevent communism from taking over.[20]

Then in 1957, South Vietnam, Thailand, Cambodia, and Laos "under the auspices" of the United Nations created the Mekong Committee, officially known as the Committee for Coordination of Investigations on the Lower Mekong River Basin.[21] China and Myanmar were

---

[12] *Id.* at 499.
[13] *Id.*
[14] *Id*. at 504.
[15] *Id.* at 504-05.
[16] *Id.* at 504.
[17] Greg Browder & Leonard Ortolano, *The Evolution of an International Water Resources Management Regime in the Mekong River Basin*, 40 NAT. RESOURCES J. 499, 504 (2000).
[18] *Id.* at 504-05.
[19] *Id.* at 505.
[20] *Id.*
[21] *Id.*

noticeably absent from the Mekong Committee. At the time, China was not a part of the United Nations and Myanmar did not wish to join the Mekong Committee.[22] The Mekong Committee was limited in its functions and its authority—its only purpose was to plan water resource development.[23] During the Mekong Committee era, the primary benefactors were the US, Japan, and Europe.[24] These donations were used to plan and investigate development projects.[25] As these projects were rearing up, the Mekong Committee agreed that major projects required unanimous approval by all members of the Committee before they could be implemented.[26] This was formally enacted in the 1975 Joint Declaration.[27] However, suddenly things changed within the dynamics of the Committee in 1975.[28] North Vietnam prevailed over South Vietnam, communism took over in Cambodia, and communist Vietnam seized control of Laos.[29] Thailand was the lone pro-capitalist government left in Southeast Asia.[30] This political turmoil led to the collapse of the Mekong Committee.[31]

After the disintegration of the Mekong Committee, there were several years without an international water management regime. However, by 1978 most of the countries were ready for a new regime.[32] Again, there were countries not inclined to join a management regime. China

[22] *Id.* at 505.
[23] Greg Browder & Leonard Ortolano, *The Evolution of an International Water Resources Management Regime in the Mekong River Basin*, 40 NAT. RESOURCES J. 499, 506 (2000).
[24] *Id.* at 507.
[25] *Id.*
[26] *Id.* at 508.
[27] *Id.*
[28] *Id.* at 509.
[29] Greg Browder & Leonard Ortolano, *The Evolution of an International Water Resources Management Regime in the Mekong River Basin*, 40 NAT. RESOURCES J. 499, 509 (2000).
[30] *Id.*
[31] *Id.*
[32] *Id.*

and Myanmar were once again not a part of the new regime.[33] Another one of these countries was Cambodia, as the ruler at the time did not wish to join any international agreements.[34] The new regime was called the Interim Mekong Committee, due to the hope that Cambodia would eventually return to the agreement.[35] The new 1978 Declaration was a reflection of the conditions of the political environment at the time, as Thailand did not want the Committee to be in control of planning and developing hydropower projects.[36] Thailand at this time was the only pro-capitalist country in the Committee.[37] For instance, the Declaration stated the function of the committee was only to "promote the development of water resources of the lower Mekong Basin."[38] The Interim Mekong Committee had more constrained functions than the prior management regime.[39] Circumstances pivoted again when in 1991 Cambodia's civil war ended.[40] After the war, the Cambodian government wanted to rejoin the Mekong regime.[41] The interim regime faced many challenges, and there were disagreements on how to create a new structure for the Committee, as the Interim Mekong Committee was only intended to be temporary until Cambodia decided to rejoin.[42] The regime almost fell apart due to these disagreements between Thailand and Vietnam and their competing political ideologies.[43] However, the members believed it was in everyone's best interest for there to be an international management regime, as

[33] *Id.*
[34] *Id.* at 510.
[35] Greg Browder & Leonard Ortolano, *The Evolution of an International Water Resources Management Regime in the Mekong River Basin*, 40 NAT. RESOURCES J. 499, 510 (2000).
[36] *Id.*
[37] *Id.*
[38] *Id.*, citing 1978 IMC Declaration, art. 4.
[39] Greg Browder & Leonard Ortolano, *The Evolution of an International Water Resources Management Regime in the Mekong River Basin*, 40 NAT. RESOURCES J. 499, 510 (2000).
[40] *Id.* at 511.
[41] *Id.* at 515.
[42] *Id.* at 516.
[43] *Id.*

it provided a system of allocating water, a shared resource, and provided a way to receive monetary assistance from other countries.[44] This belief in cooperation led to the third regime in place today, the Mekong River Commission.[45]

B. Current Management

The current management regime is the Mekong River Commission, which was created in 1995 with the signing 1995 Agreement.[46] There are four member countries: Cambodia, Laos, Thailand, and Vietnam.[47] These countries signed the Agreement on the Cooperation for the Sustainable Development of the Mekong River Basin, which created the Mekong River Commission.[48] The Mekong River Commission is an organization working towards sustainable management of the region; they gather and analyze data, provide recommendations to the countries involved for sustainable development, and promote cooperation.[49] The Commission also "acts as a regional knowledge hub on several key issues including fisheries, navigation, flood and drought management, environmental monitoring, and hydropower development."[50] The Agreement has also adopted customary international water law principles.[51] These principles

[44] *Id.*
[45] Greg Browder & Leonard Ortolano, *The Evolution of an International Water Resources Management Regime in the Mekong River Basin*, 40 NAT. RESOURCES J. 499, 516-18 (2000).
[46] *Id.* at 500.
[47] *History*, Mekong River Commission, (Feb. 3, 2023) https://www.mrcmekong.org/about/mrc/history/.
[48] Joshua D. Freeman, Note, *Taming the Mekong: The Possibilities and Pitfalls of a Mekong Basin Joint Energy Development Agreement*, 10 Asian-Pac L. & Pol'y J. 453, 454 (2009).
[49] *Mekong River Commission for Sustainable Development*, Mekong River Commission (Feb. 3, 2023, 4:05 PM), https://mrcmekong.org/.
[50] Scott C. Armstrong, *Water is for Fighting: Transnational Legal Disputes in the Mekong River Basin*, 17 CT. J. ENVTL. L. 1, 5 (2015).
[51] Phan, *supra* note 3.

are "equitable and reasonable use, "the obligation to avoid harm", and to "protect the environment and the ecosystems of the Mekong River Basin."[52]

In 1996, China and Myanmar became Dialogue Partners.[53] According to the Mekong River Commission, "fostering close cooperation with upstream countries is essential to optimally benefit from the increased flow regulation by the storage dams constructed on the Upper Mekong and minimize the risks associated with these projects."[54] Dialogue Partners are able to attend annual meetings, as well as express their opinions on matters, but they are not official members of the Commission.[55] China and the Commission signed a Memorandum of Understanding in 2002 "on the provision of daily river flow and rainfall data from two monitoring stations…during the wet season to facilitate improved flood forecasting." This Memorandum has been renewed twice since then, in 2013 and 2019.[56] There is continued cooperation between China and the Commission through an agreement that China will provide hydrological data throughout the year.[57] This data helps better predict floods and droughts in the Mekong region.[58] Before the agreement, China only provided data during the flood season.[59]

C. Rival Agreements

There is another international management agreement in the Mekong River Basin that rivals the Mekong River Commission. In 2016, the Lancang-Mekong Cooperation was created.[60]

---

[52] *Id.*
[53] *Dialogue Partners*, Mekong River Commission, https://www.mrcmekong.org/about/mrc/dialogue-partners/ (Apr. 17, 2023).
[54] *Id.*
[55] Browder & Ortolano, *supra* note 12 at 526.
[56] *Dialogue Partners*, Mekong River Commission, https://www.mrcmekong.org/about/mrc/dialogue-partners/ (Apr. 17, 2023).
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] Phan, *supra* note 3, at 114.

This international agreement was signed by all six countries that the Mekong River flows through.[61] This agreement also promotes cooperation between the countries in the region, similarly to the Mekong River Commission.[62] However, the Lancang-Mekong Cooperation does not bind the members, and China plays a highly influential role.[63] The Lancang-Mekong Agreement "rivals the Mekong River Commission and aims to bolster economic development in the Mekong River Basin without being bound by the protective principles set out in the 1995 Mekong Agreement."[64] The Lancang-Mekong Agreement does not have a duty to protect the environment or the natural resources of the Mekong River Basin, and therefore it is in conflict with the Mekong River Commission.[65] Having another agreement with similar functions undermines the legitimacy and functionality of the Commission. Therefore, efforts by the Mekong River Commission to protect fisheries might be in conflict with the Lancang-Mekong Agreement's decisions.

However, the Mekong River Commission and the Lancang-Mekong Water Resources Cooperation signed a Memorandum of Understanding in 2019, which shows their capacity to work together in monitoring and managing the Mekong.[66] The Memorandum signifies an agreement to exchange data, monitor, and assess the Mekong and its resources.[67] The Mekong River Commission also has "observer status" with the Lancang Mekong Cooperation, which grants the Commission Secretariat the ability to participate at annual meetings.[68] Despite the

[61] Id.
[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.* at 109, 114.
[66] *Dialogue Partners*, Mekong River Commission, https://www.mrcmekong.org/about/mrc/dialogue-partners/ (Apr. 17, 2023).
[67] *Id.*
[68] *Id.*

opposition between the two international agreements, they have been able to work towards cooperation for the benefit of the Mekong River Basin and its resources through the Memorandum of Understanding and their mutual "observer status." This cooperation is necessary, as the Mekong River Basin's resources are in decline, particularly the fisheries.

III. Fishery Decline

A. Overview

Fish as a source of food and as a source of income are critical in the Mekong region. Cambodia, one of the member countries, has seen a steep decline in fish catch from 2019 to 2021.[69] According to Cambodia's Fisheries Administration, from 2019 to 2020, total fish catch declined by 13.7 percent, and from 2020 to 2021, the fish catch decreased by another 7.3 percent.[70] In 2021, the Mekong River Commission released a 2018 report on the status of fisheries in the Mekong River Basin.[71] This report shows declines in the number of species, as well as in the total number of catch in the region due to hydropower development, climate change, and illegal fishing.[72]

In a December 2021 article, a Mekong River fisherman in Vietnam explained the decline in fish population he has seen in his lifetime.[73] The man is a third-generation fisherman, who stated that when he was young and fishing with his father and grandfather, the net they cast

---

[69] Zul Rorvy & Kheav Moro Kort, *Fishermen: Dams, Illegal Fishing, Climate Change Cause Fish Decline on the Upper Mekong*, Cambodianess, (Apr. 17, 2023) https://cambodianess.com/article/fishermen-dams-illegal-fishing-climate-change-cause-fish-decline-on-the-upper-mekong.
[70] *Id.*
[71] MRC, *Status and Trends of Fish Abundance and Diversity in the Lower Mekong Basin during 2007–2018*, Vientiane: MRC Secretariat, Oct. 18, 2021, https://doi.org/10.52107/mrc.qx5yo0.
[72] *Id.*
[73] Van Nguyen, *Mekong Fishermen Struggle to Survive*, VietNam News, https://earthjournalism.net/stories/mekong-fishermen-struggle-to-survive (Apr. 17, 2023).

would be full of fish.[74] Now, when he hauls the net back, there are much fewer fish.[75] The fisherman catches fish in An Giang, which is "a wetland area and the first place in Vietnam to receive floodwater from the Mekong."[76] The decline in fish stocks in the An Giang area have been plummeting, especially in 2019 and 2020 (the two most recent years before this article was published).[77] To put it into perspective, "in 2020, almost four in 10 fish of Vietnam's inland catch came from this province. Now, it contributes less than one in ten."[78] Other localities in Vietnam have also seen declines in fishery catch, but none have seen as steep a decline as this province.[79]

More fishermen in other countries in the Mekong River Basin have also experienced dwindling fish stocks. In Stung Treng province in Cambodia, fishermen explained how their livelihoods are being threatened by the declining fish catch.[80] One fisherman, San Mao, stated that a decade ago he "could catch ten to twenty kilograms of fish per day during the fishing season. But now, even though it is the fishing season, I cannot catch even three kilograms."[81] The fishermen in this province have noticed a sizeable difference in the number of fish they can catch, which has made it more difficult for them to make a living from fishing.[82] These stories show how people's lives are affected by the fishery decline, and why it is necessary to reduce the impacts that dam development, illegal fishing, and climate change are causing to the fisheries of the Mekong River Basin.

---

[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] Rorvy & Kort, *supra* note 69.
[81] *Id.*
[82] *Id.*

B. Hydropower and Dam Development

Hydropower development is one of the chief causes of fishery decline in the Mekong River Basin. There is much controversy surrounding hydropower in this region. Dams act as a barrier to movement of fish and water movement, and impact water quality and water habitats.[83]

Hydropower development acts as a barrier to fish movement.[84] There are many fish species in the Mekong that migrate annually to breed, and dams could upset this process.[85] When dams are built, they act as a blockade to upstream and downstream movement of fish.[86]

> Upstream movement is blocked because organisms such as fish may be unable to pass over the spillway or through the power station turbines because the velocity of the current is too high. Downstream movement is impaired because drifting larvae, and even adult fish, are unable to find their way through the standing water of the impoundment to locate the outlet.[87]

Downstream movement of fish is impacted as it may be difficult for them to find the outlet of the dam, which means they cannot follow their typical migratory patterns.[88] Another concern is that when fish try to move through dams, they can die from turbine blades, the steep change in air pressure, or just through the strength of the forces.[89]

Dams also modify flow patterns in the river.[90] Dams store water during the wet season, and release it during the dry season, which changes the typical flow.[91] This increases dry season

---

[83] Campbell & Barlow, *supra* note 5 at 1.
[84] *Id.* at 2.
[85] Id.
[86] *Id.*
[87] *Id.*
[88] *Id.* Outlets of dams are used to pass water through the dam when the reservoir is full. *Spillways & Outlets*, The British Dam Society, https://britishdams.org/about-dams/dam-information/spillways-and-outlets/#:~:text=Outlet%20towers%20are%20found%20in,of%20water%20through%20the%20outlet (Apr. 17, 2023).
[89] Campbell & Barlow, *supra* note 5 at 2.
[90] *Id.*
[91] *Id.*

flows and decreases wet season flows.[92] This has a substantial impact on fish.[93] When dry season flows increase, young fish, normally present in low flow due to their poor swimming abilities, are more likely to be moved downstream, which affects fish population.[94]

Dams impact the characteristics of the water and the fishery habitat.[95] When dams release water, the water may be lower in temperature and have less oxygen than the rest of the water in the river.[96] Less dissolved oxygen in the water is harmful for fish, as oxygen is vital for them to live.[97] Dams in the Mekong River often diminish habitat for the fish through inundation.[98] This inundation causes the river to be placed by the water in the impoundment, which is done through flooding sections of the river.[99]

Despite the harmful effects on many migratory fish, hydropower projects have less impact on nonmigratory fish, which make up about sixty percent of fish catch in the Mekong.[100] However, the fish still feel the effects of dams through the impacts of lower water temperature, less oxygen, and destroyed habitat. Proponents of hydropower dams argue that they are a source of renewable energy and provide revenue for the region, especially since it is predicted the

---

[92] *Id.*
[93] *Id.*
[94] Ian Campbell & Chris Barlow, *Hydropower Development and the Loss of Fisheries in the Mekong River Basin*, FRONTIERS IN ENVTL. SCI., 2-3 (2020), https://doi.org/10.3389/fenvs.2020.566509.
[95] *Id.* at 2.
[96] *Id.*
[97] *Id.*
[98] *Id.*
[99] *Id.* The impoundment holds the reservoir water. *Types of Hydropower Plants*, Office of Energy Efficiency & Renewable Energy, https://www.energy.gov/eere/water/types-hydropower-plants (Apr. 17, 2023).
[100] Campbell & Barlow, *supra* note 5 at 2.

region will face a further increase in energy demand.[101] Overall, dams have devasting impacts on all fish species through acting as a barrier to fish movement, changing natural flow patterns in the river, less oxygen, and loss of habitat. The decline in fisheries is further heightened by other causes, like climate change and illegal fishing.

C. Climate Change

Another leading cause of the fishery decline in the Mekong region is climate change.[102] Climate change has led to an increase in temperatures and more intense droughts and flooding.[103] These changes are detrimental to the fisheries of the Mekong.[104] According to the Mekong River Commission, the problems are only expected to escalate.[105]

Weather fluctuations cause more extreme droughts in the Mekong, which leads to lower water levels.[106] Lower water levels impact fish breeding, which in turn causes there to be less fish. "Whitefish species migrate upstream every year… to breed. After that, fish eggs and juveniles drift along the floodwater at the beginning of the season to the Mekong Delta, where they arrive at rivers, flooded fields, and ditches, where they can find food and grow."[107] Droughts decrease water levels, which means poorer habitats and less food for fish.[108]

---

[101] Frank Lawson, *Sustainable Development Along International Watercourses: Is Progress Being Made?,* 16 U. Denv. Water L. Rev. 323, 325 (2013). Campbell & Barlow, *supra* note 5 at 3.
[102] *Climate Change*, Mekong River Commission, https://www.mrcmekong.org/our-work/topics/climate-change/ (Apr. 17, 2023).
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] Van Nguyen, *Mekong Fishermen Struggle to Survive*, VietNam News, https://earthjournalism.net/stories/mekong-fishermen-struggle-to-survive (Apr. 17, 2023).
[107] *Id.*
[108] *Id.*

D. Illegal Fishing

Illegal fishing in the Mekong River has exacerbated the issues caused by climate change and hydropower development. In Cambodia, Prime Minister Hun Sen gave a speech declaring that officials must crack down on illegal fishing in the Tonle Sap lake.[109] This issue became significant to the Cambodian Prime Minister when the president of the Royal Academy of Cambodia stated that illegal fishing was leading to the depletion of fish stocks in Cambodia.[110] His speech started a campaign to stop the use of illegal fishing techniques.[111] One of these techniques is electrofishing.[112] Electrofishing stuns or kills everything in the water for up to a 40-meter radius.[113] Hun Sen cautioned the governors of the provinces that if illegal fishing continued without enforcement, they would possibly be removed from their positions.[114] The Tonle Sap lake region is a more remote area, and so illegal fishing has been able to continue mostly unchecked by authorities.[115] "In the eight months prior to the outbreak of the COVID-19 pandemic in December 2019, authorities reported 1,843 cases of illegal fishing."[116] However,

[109] Stefan Lovgren, *In Cambodia, a Battered Mekong Defies Doomsday Predictions*, YaleEnvironment360, March 2, 2023, https://e360.yale.edu/features/mekong-river-cambodia-recovery. *Cambodian PM Orders Crackdown on Illegal Fishing in Mekong*, UCA News, Mar. 25, 2022, https://www.ucanews.com/news/cambodian-pm-orders-crackdown-on-illegal-fishing-in-mekong/96654.
[110] *Cambodian PM Orders Crackdown on Illegal Fishing in Mekong*, UCA News, Mar. 25, 2022, https://www.ucanews.com/news/cambodian-pm-orders-crackdown-on-illegal-fishing-in-mekong/96654.
[111] *Id.*
[112] *Id.*
[113] Gerald Flynn, Andy Ball, & Sorn Srenh, *On Patrol, a Mekong Village Tackles Electric Fishing Scourge*, New Naratif, Feb. 8 2021, https://newnaratif.com/on-patrol-a-mekong-village-tackles-electric-fishing-scourge/.
[114] *Cambodian PM Orders Crackdown on Illegal Fishing in Mekong*, UCA News, Mar. 25, 2022, https://www.ucanews.com/news/cambodian-pm-orders-crackdown-on-illegal-fishing-in-mekong/96654.
[115] *Id.*
[116] *Id.*

despite the intentions to stop illegal fishing by all fishermen, the campaign came under fire for focusing on the prosecution of smaller-scale fishers, rather than commercial fishers who the campaign was intended to target.[117]

Fishermen have been struggling to profit from fishing in the Mekong, which has led more and more to resort to illegal fishing.[118] They have been struggling due to lower water levels caused by dams and climate change.[119] However, illegal fishing only heightens the fishery decline. Illegal fishing is very lucrative, as fishermen are able to catch much more fish with electrofishing than through legal techniques.[120] There are consequences for illegal fishing; if caught, you can be fined or even imprisoned.[121] However, despite the campaign to crackdown on illegal fishing, it still continues due to difficulty with enforcement.[122] Illegal fishing is done at night, in the dark. There are not enough patrol teams, and they have large areas to cover.[123] Another issue with enforcement is that the illegal fishermen are often armed and will fight patrol members.[124] These obstacles make it difficult to put an end to illegal fishing in the Mekong River.

The use of illegal fishing equipment has certainly been an issue in the Mekong River Basin. However, it may not be as big as a driving factor in fish decline than some believe. In one study from 2021, fishermen stated that illegal fishing was by far the greatest reason for fish catch

[117] Lovgren, *supra* note 110.
[118] *Id.*
[119] *Id.*
[120] Flynn, Ball, & Srenh, *supra* note 114.
[121] *Id.*
[122] *Id.*
[123] Rorvy & Kort, *supra* note 69..
[124] Flynn, Ball, & Srenh, *supra* note 114.

decline in recent years.[125] The study found that illegal fishing gear has been regularly used in the Mekong region since the 1990s, and it's more likely that the change in water levels and development are much larger drivers of fishery decline.[126]

E. Possible Recovery

Despite the struggles the Mekong River Basin is facing, there may be some hope for its recovery. According to a recent article from March 2, 2023, Cambodia has seen an increase in fish stocks.[127] This is thought to be due to the most recent monsoon season providing heavier rainfall than previous years, along with more enforcement of illegal fishing.[128] The Tonle Sap Lake region in Cambodia is seeing a higher fish catch, as well as more diversity of fish.[129] "With the lake expanding into seasonally flooded forest, which provide excellent feeding grounds for fish, fish populations appear to have been boosted."[130] There have even been sightings of rare and endangered fish.[131] One of these fish species was Jullien's golden carp, which is critically endangered.[132] At the "dai" fishery, where commercial fishers use stationary nets, thirty percent more fish were caught than last year.[133] In previous years, over sixty percent of these nets had to be shut down due to lack of fish.[134]

---

[125] An V. Vu, Kent G. Hortle, & Du N. Nguyen, *Factors Driving Long Term Declines in Inland Fishery Yields in the Mekong Delta*, Water 2021, 13, 1005, https://doi.org/10.3390/w13081005, 11.
[126] *Id.* at 11-12.
[127] Lovgren, *supra* note 110.
[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] Stefan Lovgren, *In Cambodia, a Battered Mekong Defies Doomsday Predictions*, YaleEnvironment360, March 2, 2023, https://e360.yale.edu/features/mekong-river-cambodia-recovery.
[134] *Id.*

Cambodia has prioritized conservation of the Mekong and has proposed a plan to ensure its vitality.[135] Their plan includes designating a biodiversity hotspot region of the river a UNESCO World Heritage Site.[136] This denotation will allow this region of the Mekong River to be safe from dam development, which is a driving factor of fishery decline in the river.[137] This section of the river is known for housing extremely large fish, like the giant freshwater stingray.[138] In 2022, a 661-pound stingray was caught, which was given the Guinness World Record for the largest freshwater fish species.[139] Another reason for the World Heritage Site project is to safeguard the fewer than 100 remaining Irrawaddy River dolphins.[140] These dolphins live in a deep pools in a part of the river proposed to receive UNESCO World Heritage Site protection.[141] According to a World Wildlife Fund conservation officer and Cambodian Fisheries Administration official, "the dolphins symbolize the biological importance of the Mekong River, and this designation would significantly attract the attention of all the stakeholders concerned with protecting the Mekong River and its aquatic biodiversity."[142] Protecting a section of the river shows that the member countries are making conservation a priority, and are taking steps to reduce the devastation that has occurred to the river and its riverine habitants.

---

[135] *Id.*
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] Stefan Lovgren, *In Cambodia, a Battered Mekong Defies Doomsday Predictions*, YaleEnvironment360, March 2, 2023, https://e360.yale.edu/features/mekong-river-cambodia-recovery.
[140] *Id.*
[141] *Id.*
[142] *Id.*

Cambodia has also bolstered conservation efforts in other ways. Cambodia decided to delay the building of hydropower dams on the Mekong River for the next decade.[143] The two dams the Cambodian government postposed were the Sambor Dam and the Stung Treng Dam, the former being one of the largest hydropower development projects ever proposed to be built on the Mekong.[144] The Sambor dam would act as a total barricade for fish migration.[145] "According to the Cambodian Fisheries Administration, the Sambor Dam alone is predicted to reduce yields of fish and other aquatic animals by sixteen to thirty percent."[146] The Chinese company involved with the dam backed out in 2011 due to stated concerns of the dam's detrimental impact on the Mekong River, but the Cambodian government remained involved until 2020.[147] The Cambodian government then backed out and cited its concern for the Mekong's biodiversity if more dams were built.[148] "The decision came after a Japanese consultant recommended Cambodia seek energy elsewhere."[149] The postponement of two large dams on the Mekong's mainstream flow gives hope that the concerns of declining fisheries are

[143] Rebecca Ratcliffe, *Cambodia Scraps Plans for Mekong Hydropower Dams*, Mar. 19, 2020, https://www.theguardian.com/world/2020/mar/20/cambodia-scraps-plans-for-mekong-hydropower-dams.
[144] *Id.* Phan, *supra* note 3 at 114.
[145] Phan, *supra* note 3 at 116.
[146] Rob Harbinson, *Cambodia's Sambor Dam Plans Cause Controversy as Public Left in the Dark*, Mongabay, Mar. 16, 2017, https://news.mongabay.com/2017/03/cambodias-sambor-dam-plans-cause-controversy-as-public-left-in-the-dark/.
[147] "In 2011, the China Southern Power Grid Company withdrew from the project, reasoning that it was 'a responsible company.'" "The Sambor Dam would be the largest hydropower dam in the Mekong River Basin." It would have displaced thousands of people and would have resulted "in a loss of 95 percent of sediment flow." Phan, *supra* note 3 at 116. Harbinson, *supra* note 147. Ratcliffe, *supra* note 144.
[148] Phan, *supra* note 3 at 114.
[149] "Cambodia's decision means that neighboring Laos, which has opened two new dams… is the only country in the Lower Mekong Basin planning hydropower on the river." Ratcliffe, *supra* note 144.

being considered. The Cambodian government's decision is a reflection of the growing worry of what could happen without the Mekong fisheries.

Cambodia seems to be taking the conservation of the Mekong River very seriously, and one can only hope that the other governments in the Mekong region will follow suit. Cambodia can act as a guide for strategies to follow to protect such an important piece of Southeast Asia. Despite the success that Cambodia has had in their conservation efforts, it is still critical to further protect the Mekong River and its fisheries. If these efforts reduce, the decline could worsen, and it would be detrimental to the region.

IV. Discussion and Recommendation

A. Management Concerns and Solutions

There are many difficulties surrounding management of the fisheries in the Mekong River Basin. The Mekong River flows through several countries as previously mentioned: Vietnam, Cambodia, Thailand, Laos, China, and Myanmar. Since the Mekong River is a shared resource, it can be difficult to manage at an international level, especially when there are competing interests. International agreements, more so than domestic ones, are faced with a plethora of limitations. The management concerns this paper will highlight are membership of the Mekong River Commission and impacts from nonmember countries, and lack of authority to enforce the Agreement. This section will address these concerns and provide potential solutions.

1. Nonmember Countries as Blockades to Regional Cooperation

The impact on the region from nonmember countries is a critical issue of concern. China and Myanmar are not members of the Mekong River Commission, they are just Dialogue Partners. Dialogue Partners attend meetings but are not bound by the Agreement.[150] The

[150] Armstrong, *supra* note 51 at 6.

Agreement does not bind China and Myanmar "to take into account the downstream countries' water rights before constructing dams or undertaking other project that may adversely affect the downstream countries."[151] The Commission has no say in China and Myanmar's potential development projects.[152] Without the upstream countries as members, the Commission has less ability to stop harmful activities on the Mekong. For instance, if the Commission cannot stop China and Myanmar from building hydropower infrastructure, then the Commission's conservation efforts will be almost useless.

This lack of membership by the upstream countries, China and Myanmar, is a hurdle in trying to resolve the fishery crisis in the Mekong River Basin. In particular, it seems that China is reluctant to join the Commission, as it would limit its national sovereignty.[153] China is a geopolitical power in the world, and especially in Asia, but they have little incentive to join the Agreement, as they wish to remain fully autonomous in deciding to develop hydropower infrastructure. Furthermore, China is a large proponent of hydropower development.[154] China has a strong need for electricity, and dams provide a much-needed source of electricity.[155] The country has financed dams in other Mekong countries.[156] In turn, the Mekong countries export electricity to China.[157] Hydropower development supports China's ever-growing electricity needs. China is unlikely to consider the downstream countries' wishes, unless there is an

[151] *Id.* at 7
[152] Phan, *supra* note 3 at 114.
[153] Armstrong, *supra* note 51 at 7.
[154] "China has the largest number of dams in the world (approximately 25,000)." James D. Fry & Agnes Chong, *International Water Law and China's Management of Its International Rivers*, 39 B. C. Int'l & Comp. L. Rev. 227, 246 (2016).
[155] *Id.*
[156] *Id.* at 248.
[157] *Id.*

incentive to support the Mekong River Commission's pledge to ensure sustainability of fisheries in the Mekong River Basin.

2. Japan as an Ally to Ensure Cooperation

One way to incentivize China to cooperate with the Mekong River Commission is to involve other countries and international organizations when there is a dispute with China. Under the current 1995 Agreement, Article 35 states that when there is a dispute amongst member countries, a third-party mediator may be used.[158] Though China is not a member country, the same general technique could be used when the Commission, or one of the member countries, is in disagreement with China.

Japan as a strategic ally and mediator to the Mekong River Commission would be a wise decision. This strategy would help to convince China to take into account the member countries' wishes when planning for hydropower development. Japan has a history of ties to the region and to the Mekong River Commission; Japan was one of the primary benefactors of the original Mekong Committee.[159] In 2007, Japan also initiated the Japan-Mekong Region Partnership Program.[160] Japan has continued its relationship with the Mekong region, and in 2016, launched the Japan-Mekong Connectivity Initiative.[161] Not only does Japan have historical ties to the Mekong region, but Japan also has the economic forces and political power to face China. Japan faces its own tensions with China, due to the fact that China has often rejected international

[158] Phan, *supra* note 3 at 110.
[159] Browder & Ortolano, *supra* note 12 at 507.
[160] Kei Koga, *The Emerging Power Play in the Mekong Subregion: A Japanese Perspective*, Asia Pol'y, Vol. 17, No. 2, 28, 29, https://doi.org/10.1353/asp.2022.0023 (Apr. 2022).
[161] *Id.* at 30

standards.[162] To entice China to cooperate with the Mekong River Commission, Japan should act as a powerful opponent to China's overreaching hydropower development plans.

3. Lack of Authority to Enforce the Agreement

Another management concern is the lack of authority held by the Mekong River Commission, as it can identify the problems, but only the member states can enact regulations and enforce them.[163] Convincing the governments to do this in a manner that is comprehensive and cooperative is challenging, especially with lack of authority over enforcement. The Mekong River Commission does not have an enforcement mechanism if a member country breaches the agreement.[164] The Commission cannot require a country to pay a penalty or enforce compliance.[165] "Article 35 asserts that in instances where the Mekong River Commission is unable to resolve disputes, the member countries must resort to diplomatic channels, or if mutually agreed upon, mediation by a third party."[166] This language greatly inhibits the Commission from taking action when there has been noncompliance.[167] This is a concern because when member countries do not comply, there are no consequences. In order to ensure that member countries are following the treaty, there needs to be a more robust enforcement procedure.

---

[162] *Id.* "Japan also began to incorporate strategic agendas more actively in the Japan-Mekong cooperative framework, motivated in large part by China's increasing maritime assertiveness in the East and South China Seas, which has raised regional security concerns."
[163] Mark Tilly, *Trouble on the Mekong*, Lowry Institute, Nov. 26, 2021, https://www.lowyinstitute.org/the-interpreter/trouble-mekong#:~:text=The%20cumulative%20impacts%20of%20climate,who%20rely%20on%20the%20Mekong.
[164] Phan, *supra* note 3 at 110.
[165] *Id.*
[166] *Id.*
[167] *Id.*

For example, Laos's Xayaburi Dam was constructed without agreement by all of the member countries in the Mekong River Commission.[168] In this case, after receiving pressure from Cambodia and Vietnam, Laos "eventually agreed to a six-month consultation period, but they declared construction would continue throughout the consultation."[169] This shows the relative softness of the Agreement, and how member countries do not face consequences from the Commission when they ignore the mandates of the Agreement. This could be fixed through enforcement procedures that give the Agreement "teeth."

4. Giving the Mekong River Commission "Teeth"

To resolve the Mekong River Commission's lack of enforcement authority, Article 35 of the Agreement should be amended to allow the Commission to issue financial penalties when a member country has not complied with the Agreement and diplomatic channels have not been successful. These penalties must be a "last resort;" they should only be issued when negotiation and mediation have failed, and there are no other alternative methods available to reach an agreement among the member countries. Financial penalties would provide more incentive to comply with the Agreement. Member countries would not want to go ahead with projects against the wishes of the other governments, because they would be required to pay. These penalties should be costly enough that they deter member states from violating the Agreement. The Commission should then use the profits from the penalties to increase fishery conservation efforts in the Mekong River Basin.

Using the previous example of the Xayaburi Dam, under the proposed amendment to the Agreement, the Mekong River Commission could have threatened financial penalties when Laos

[168] Armstrong, *supra* note 51 at 11.
[169] *Id.*